CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted].50.

BARTON W. KUHN, PLAINTIFF IN ERROR,

versus

FAIRMONT COAL COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT CLARKSBURG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Questions Certified to the Supreme Court of the United States By the United States Circuit Court of Appeals for the Fourth Circuit on the Case Stated.

Filed Dec. 14, 1907.

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 747.

BARTON W. KUHN, PLAINTIFF IN ERROR,

versus

FAIRMONT COAL COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT CLARKSBURG.

Certificate of the United States Circuit Court of Appeals for the Fourth Circuit to the Supreme Court of the United States under Section 6 of the Act of March 3, 1891, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes."

The plaintiff instituted his action of trespass on the case in the Circuit Court of the United States for the Northern District of West Virginia against the defendant on the 18th day of January, 1906, to recover damages for injury to his real estate at the hands of the defendant by reason of the removal of the support for plaintiff's land by the defendant in its mining operations.

The declaration avers that plaintiff is the owner in fee of a certain tract of land situated on the West Fork River in Marion County, West Virginia, containing about ninety-one acres; that the same had been underlaid with coal; that on the 21st day of November, 1889, he sold and conveyed to Johnson

N. Camden all of the coal underlying said land; that said coal afterwards passed to the defendant, Fairmont Coal Company; that the said defendant was the owner thereof on the day of January, 1906; that the plaintiff of right was entitled to have all his surface and other strata overlying said coal supported in its natural state either by pillars or blocks of said coal or by artificial support; that the defendant upon the day and year last aforesaid and prior thereto, mined and removed the coal from under the said land, as it had the right to do, leaving, however, large blocks or pillars of said coal as a means of support to the overlying surface of said tract of land, as it of right was required to do; that on the day and year aforesaid the defendant wholly ignoring and disregarding the rights of the plaintiff, did knowingly and wilfully and negligently and without any compensation therefor, or for damages arising therefrom mine and remove all of the said blocks or pillars of coal left as aforesaid, and by reason of the removal and by reason of the failure to provide in any way any proper or sufficient artificial or other support for the overlying surface of land as of right it should have done, the said land or large portions thereof was caused to fall; that it was cracked, broken and rent causing large holes and fissures to appear upon the surface; that all the water and water courses were destroyed, all of which injuries were to the great damage of the plaintiff. The *ad damnum* clause of the declaration laid the damages sustained at $10,000.00.

On the 17th day of April, 1906, the defendant, by counsel, came into court and craved oyer of the deed from the plaintiff for its coal which was brought into court and read. The granting clause in said deed is as follows: "The parties of the first part do grant unto the said Johnson N. Camden all the coal and mining privileges necessary and convenient for the removal of the same in, upon and under a certain tract or parcel of land situated in the county of Marion, on the waters of the West Fork River, bounded and described as follows, to-wit:

(Boundry lines omitted.) Together with the right to enter upon and under said land and to mine, execavate and remove all of said coal, and to remove upon and under the said lands the coal from and under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described and make all necessary structures, roads, ways, excavations, airshafts, drains, drainways and openings necessary or convenient for the mining and removal of said coal and the coal from coterminous and neighboring lands to market."

Thereupon the defendant demurred to the declaration, which, after consideration of the law arising thereon the court

sustained. Thereupon the plaintiff by petition obtained a writ of error from this court.

The plaintiff is a citizen and resident of the State of Ohio, and the defendant is a citizen and resident of the State of West Virginia. The property of both plaintiff (the land) and defendant (the coal) is situated in West Virginia. The contract under which the title to the coal passed to defendant was executed in West Virginia and the cause of action arose in said State.

In 1902 there was instituted in the State Court of West Virginia the suit of Leander Griffin vs. Fairmont Coal Company raising a similar question to the one raised in this case, the language of the deed in that case being the same as the language of the deed in this case, a printed form being used in each case. That case was carried to the Supreme Court of West Virginia and was decided in November, 1905, 59 W. Va., 480, the State Court, through McWhorter, Judge, sustaining the demurrer to the declaration and dismissing the case, Poffenberger, Judge, dissenting.

Under Rule XII. of the Supreme Court of Appeals of West Virginia the plaintiff in that case filed his petition for rehearing. Rule XII. is as follows: "No petition for a rehearing will be entertained unless presented within the term at which the decision is announced, nor in any case later than thirty days after the date of the decision of the case in which it is presented (unless as otherwise authorized by law) and no rehearing will be allowed unless one of the Judges who concurred in the decision shall be dissatisfied with the conclusion reached; and no petition for a rehearing will be entertained by the court in any case unless the reasons therefor are printed and filed with the petition but if the decision complained of is announced within fifteen days of the close of the term, the printing may be dispensed with."

Where under this rule a petition is filed for a rehearing the judgment of the court is held in abeyance, and there is no decision until the petition is acted upon, which, in that case was not done until March 27, 1906, when a rehearing was refused, and Cox, Judge, delivered a concurring opinion and Poffenberger, Judge, another dissenting opinion. Pending the consideration of the petition for a rehearing this suit was brought in the United States Court.

It is contended by the defendant in error that the decision by the State Court of the question similar to the question raised in this case is binding on this court.

The plaintiff in error on the other hand contends that the State decision, which was announced subsequent to the date of the contract, subsequent to the time of the injury of which

he complains, and subsequent to the institution of his suit can not act retroactively; that United States Courts are not bound by State decisions in actions of trespass on the case for a tort, title to property not being in issue.

Upon the foregoing statement the question of law concerning which the court desires instruction is:

Is this court bound by the decision of the Supreme Court in the case of Griffin *vs.* Fairmont Coal Company, that being an action by the plaintiff against the defendant for damages for a tort, and this being an action for damages for a tort based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being in fact identical, that case having been decided after the contract upon which defendant relies was executed, after the injury complained of was sustained, and after this action was instituted?

In accordance with the provision of Section 6 of the Act of March 3, 1891, establishing Circuit Courts of Appeals, the foregoing question of law is, by the Circuit Court of Appeals for the Fourth Circuit, hereby certified to the Supreme Court of the United States for decision.

Witness our hands this 12th day of December, 1907.

J. C. PRITCHARD,
Circuit Judge Presiding.

WM. H. BRAWLEY,
District Judge.

THOS. R. PURNELL,
District Judge,

Judges of the United States Circuit Court of Appeals for the Fourth Circuit, sitting in said case.

Clerk's Certificate.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original certificate of questions or propositions of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix {Seal of Court} the seal of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 17th day of December, A. D., 1907.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 242.

BARTON W. KUHN

versus

FAIRMONT COAL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF EDWARD A. BRANNON, OF COUNSEL FOR FAIRMONT COAL COMPANY.

Statement.

This case comes before this court upon a certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

The certificate states that the case came before the latter court on a writ of error from a judgment of the United States Circuit Court for the District of West Virginia, sustaining a demurrer to the declaration, and that upon the hearing of the writ of error certain questions of law arose, concerning which said Circuit Court of Appeals desired the instruction of this court.

The certificate and brief for plaintiff Kuhn set forth the facts fully, which renders it unnecessary to repeat them here

further than to quote the following paragraphs from said certificate:

"The plaintiff is a citizen and resident of the State of Ohio, and the defendant is a resident of the State of West Virginia. The property of both plaintiff (the land) and defendant (the coal) is situated in West Virginia. The contract under which the *title* to the coal passed to defendant was executed in West Virginia and the cause of action arose in said State.

"In 1902 there was instituted in the State court of West Virginia the suit of *Leander Griffin v. Fairmont Coal Company* raising a similar question to the one raised in this case, the language of the deed in that case being the same as the language of the deed in this case, a printed form being used in each instance. That case was carried to the Supreme Court of West Virginia, and was decided in November, 1905 (59 W. Va., 480), the State court, through McWhorter, judge, sustaining the demurrer to the declaration and dismissing the case, Poffenbarger, judge, dissenting. Under Rule XII of the Supreme Court of Appeals of West Virginia the plaintiff in that case filed his petition for rehearing."

On March 27, 1906, the rehearing was refused by the said Supreme Court, and Cox, judge, filed a carefully considered concurring opinion for the majority of the court, and Poffenbarger, judge, filed another dissenting opinion.

Pending the consideration of said petition for rehearing, *but after the decision of the case originally*, the present action was brought in said United States Circuit Court.

After full argument in said last-named court, Hon. Alston G. Dayton, district judge, sitting in said circuit court, sustained the demurrer, and in an able written opinion (to be found on page 8 of the record in the Circuit Court of Appeals) based his decision upon the holding of the West Virginia Supreme Court in the Griffin case, *supra*, which was identical with this case and had, at the time of his opinion, been decided by four judges out of five composing the highest

State court, and the rehearing had been refused for reasons stated in the opinions filed. There had not previously been any decision by said Supreme Court of Appeals of West Virginia upon the questions arising in the Griffin case, and hence in said Griffin case the court considered the questions with great care and delivered able and elaborate opinions.

Said demurrer in this present case was sustained, and said opinion of Judge Dayton was filed April 19, 1907, said rehearing in the State court having been refused March 27, 1906, more than one year previous.

ARGUMENT.

The contention of defendant is that the decision of the highest State court construing a deed conveying real estate in that State, and a statute of that State bearing upon the questions involved, in a case identical with the deed and statute involved in this case, is binding upon the courts of the United States sitting in West Virginia, and Judge Dayton so held.

The language contained in the deed construed in the Griffin case, as well as that in this case, is set forth in the certificate (page 2), and the State statute referred to is to be found in the West Virginia Code of 1906, chapter 72, section 2, reading as follows:

"Every such deed conveying lands shall, unless an exception be made therein, be construed to include all the estate, right, title, and interest, whatever, both at law and in equity of the grantor in such lands."

The West Virginia Supreme Court based its decision in the Griffin case upon its construction of the deed granting the coal, and did not consider that the case involved a consideration of the English doctrine of *subjacent* support to the overlying surface by the underlying minerals; but, because that doctrine was relied upon with such confidence by Griffin to sustain his claim to damages, the court did go into

that question at some length, as will be seen by a reference to 59 W. Va. Reports, page 480.

There had never been a decision in either Virginia or West Virginia upon this doctrine, which had its origin in 1800, in the English case of *Harris v. Ryding,* 5 M. & W., page 60, the two Virginia cases of *Stevenson v. Wallace,* 27 Grat., 77, and *Tunstall v. Christian,* 80 Va., 1, involving the entirely different question of *adjacent* or lateral support from an adjoining lot. In other words, those cases turn upon a *natural* right, while the question in the Griffin case turned upon a *contractual* right contained in a solemn muniment of title to real property. The case of *Northern Tr. Co. v. Chicago,* 99 U. S., 465, is one of *lateral* support also.

The highest State court, in construing a deed containing language identical with the language contained in the deed involved in this case, held that said language gave clear and absolute right to remove all the coal without liability for damages for subsidence of the surface by the removal of it all, and that the doctrine of the English courts as to right of subjacent support for the surface did not apply, because the case was controlled entirely by the peculiar and definite language of the deed there passed upon. Hence the said doctrine is not here discussed, for the reason that said doctrine is not here involved, and because it is foreclosed by said State decision upon title to real estate.

As appears from the opinion of the United States Circuit Court, Judge Dayton regarded the decision of the West Virginia Supreme Court of Appeals as conclusive upon the original question of the true meaning of the deed involved in this

case, since a deed containing identical language had been passed upon by that court in the Griffin case. He said that question having been elaborately and maturely considered by the highest State court, after having been twice argued there, and the question there involved being one concerning the transfer of real estate within the State, a question of purely local law, he felt concluded by that decision, and that therefore he would not consider the merits of the original doctrine of "*subjacent* support."

While the defendant here regarded that doctrine as not applicable to the deed involved in the Griffin case, yet argument was submitted upon it when the question came before the State courts, because the same opposing counsel then relied upon said "subjacent-support" doctrine. We did not regard it as applicable then. But in view of the clear holding of the State Supreme Court that the case was *not* controlled by that doctrine because of the language of the deed there involved, and of the holding of the United States Circuit Court that it was concluded by said State decision, we deem that original question closed, and therefore forbear to consume the time of this court with any further reference to said doctrine, but will refer only to the language of said deed set out in the certificate (p. 2, bottom). The words "together with," in connection with the previously mentioned subject in a deed or power, operate to enlarge, and not to restrain, that which was previously granted (*Winter v. Loveden,* 1 Ld. Raymond, 267; *Cardigan v. Armitage,* 2 Barn. & Cres., 197; *Panton v. Taft,* 22 Ill., 166; *Montana Co. v. St. L. Mining Co.,* 204 U. S., p. 216).

FEDERAL COURTS FOLLOW DECISIONS OF HIGHEST STATE COURTS IN CONSTRUING INSTRUMENTS PASSING TITLE TO REAL ESTATE WITHIN THE PARTICULAR STATE.

As above set forth, the Supreme Court of West Virginia has held, upon a deed containing identical language to that involved in this case, that such a deed passes to its grantee all title to *all* the coal in the tract, with right to mine out and remove *all* the coal without obligation to devote any part thereof for support of the surface land, and without liability for damages to the overlying surface by subsidence thereof caused by taking out *all* said coal, without leaving pillars or blocks of coal to support the surface (*Griffin v. Fairmont Coal Company*, 59 W. Va., 480).

That decision is conclusive in this case because it is a decision of the highest court of the State construing a deed passing title to real estate within that State. If there *is any rule established and fixed* by the decisions of the Federal courts, particularly this court, it is that the decisions of the highest court of the States of the American Union as to land titles within the States are recognized and followed by the Federal courts.

Any other rule would produce endless confusion and disorder in titles to real estate. This is the rule not only of general law, that the law of a nation or State governs title to land within it, but it is the mandate of the Judiciary Act of 1789, which provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply" (*U. S. Comp. Stat.* 1901, p. 581; *U. S. Rev. Stat.* 1878, sec. 721).

It is settled that State decisions are included under the language of that statute, "the laws of the several States." In other words, a State court decision as to land titles is a

"law" of the State just as much as a State constitution or statute, because "laws," as used in the Judiciary Act, include State constitutions, statutes, common law, and *decisions* expounding them (*Boyle v. Zacharie,* 6 Pet., 648; *Russell v. Southard,* 12 How., 139).

This rule of following State decisions as to land titles found early and clear expression in *Jackson v. Chew,* 12 Wheat., 153, holding that "the Supreme Court adopts the local law of real property as ascertained by the decisions of the State courts, whether these decisions are grounded on the construction of the statutes of the State or form a part of the unwritten law of the State which has become a fixed rule of property." The rule laid down in the above case has ever since been followed by the United States Supreme Court and announced in many decisions. "This court looks to the law of the State in which land is situated for the rule which governs its descent, alienation and transfer, and *the effect and construction* of wills and *other conveyances*" (*De Vaughn v. Hutchinson,* 165 U. S., 566. So in *Clark v. Clark,* 178 U. S., 186; *Oliver v. Clarke,* 106 Fed., 402; *Berry v. Bank,* 93 Fed., 44).

"The laws of the State in which lands are situated control exclusively its descent, alienation and *transfer,* and *the effect and construction of instruments* intended to convey it" (*Brine v. Insurance Co.,* 96 U. S., 127). The same principle is found in *Abraham v. Casey,* 179 U. S., 210; and *Claiborne Co. v. Brooks,* 111 U. S., 400.

"The construction of State law upon a question affecting the title to real property in the State by its highest court is binding upon the Federal courts" (*Williams v. Kirtland,* 13 Wall., 306; *Arndt v. Griggs,* 134 U. S., 315, where the subject is fully discussed).

"Where the subject of dispute is real property situate within a State, her laws exclusively govern in respect to the rights of the parties" (*Suydam v. Williams,* 24 How., 427.

So also, *Chicago v. Robbins,* 2 Black, 418; *Green v. Neal,* 6 Pet., 291, 296).

In *Bucher v. Cheshire R. R. Co.,* 125 U. S., 555, after saying that the courts of the United States adopt the decisions of the State courts on State law, or where those decisions, whether found on State statutes or not, concern rules of property within the State, Mr. Justice Miller defines the "rules of property" to be those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto. (So, *Warburton v. White,* 176 U. S., 484; 11 Cyc., 903, 904.) The Federal court of appeals followed State court in case of *Buford v Kerr,* 90 Fed., 513, in passing upon an estate created by deed.

In addition to all the authorities above referred to, it is insisted that this case is settled by the case in the United States Circuit Court of Appeals in the same circuit from which the present question is certified (*Foster v. Elk Fork Oil & Gas Co.,* 90 Fed., 178; 32 C. C. A., 560), holding that the decision of the Supreme Court of West Virginia construing an oil and gas lease establishes a rule of property which will be recognized and followed by that court. Upon this subject we refer with great reliance to the written opinion of Judge Dayton, delivered in our present case in the circuit court and filed with the record at Richmond (page 8).

The United States Supreme Court has even overruled its own decisions on a question regarding title to real estate in order to conform to the decision of the State court upon the same subject afterwards delivered (*Roberts v. Lewis,* 153 U. S., 367; *Lowndes v. Huntington,* 153 U. S., 1; *Green v. Neal,* 6 Pet., 291; *Moores v. Bank,* 14 Otto, 625).

"We may think that the Supreme Court has misconstrued its constitution or statute; but we are not at liberty to set aside its judgments. That court is the final arbiter as to

such questions" (*Forsythe v. Hammond,* 166 U. S., 518. So, *Board v. Coler,* 21 Sup. Ct. R., 458; 180 U. S., 506).

There are cases holding that a Federal court will not be bound by State decisions, but will exercise its own independent judgment, though that judgment differ from State decisions. Such is the case in suits involving general commercial law, the law of insurance, the law of fellow-servantcy, and some others of like nature, depending on general law applicable the country over (*Lane v. Vick,* 3 How., 462; *Hartford Ins. Co. v. Chicago R. R. Co.,* 175 U. S., 91; *Burgess v. Seligman,* 107 U. S., 20; *Rowan v. Runnels,* 5 How., 134; *Douglass v. Pike County,* 101 U. S., 687). But in *Swift v. Tyson,* 16 Pet., 1, while it is stated that in certain cases the Federal court may act on its own independent judgment in such cases, it is admitted and stated that where "rights and titles to things having a permanent locality, such as rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character," the State decision governs.

In *Mead v. Portland,* 200 U. S., 148, this court said: "While the interpretation of a local ordinance by the highest court of the State is not indisputable, and even though it may conflict with other decisions of the courts of the State, if it does not conflict with any decision made prior to the inception of the rights involved, this court will lean to an agreement with the State court (*Burgess v. Seligman,* 107 U. S., 20)."

In *Beauregard v. New Orleans,* 59 U. S., 497, 18 How., 497, it is held: "The constitution of this court requires it to follow the laws of the several States as rules of decision wherever they properly apply. And the habit of the court has been to defer to the *decisions* of their judicial tribunals upon questions arising out of the *common law* of the State, especially when applied to the *title of land.* No other course could be adopted with any regard to propriety. Upon cases like the present the relation of the courts of the United

States to a State is the same as that of its own tribunals. They administer the law of the State, and to fulfill that duty they must find them as they exist in the habits of the people and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the States and the Union would be productive of the greatest mischief and confusion (*Jackson v. Chew*, 12 Wheat., 153)."

In *Balkam v. Woodstock Iron Co.*, 154 U. S., 177, Mr. Justice White shows clearly the distinction between the case of *Leffingwell v. Warren*, 2 Black, 599, and that of *Burgess v. Seligman*, 107 U. S., 32, which latter is often relied upon as authorizing the United States courts to form an independent judgment; but Justice White shows that the latter case affords no such authority in such a case as *Leffingwell v. Warren*, which turned upon the construction of a State statute of limitations as to real estate within a State. Our present case concerns the same subject-matter—title to real estate within West Virginia; hence *Burgess v. Seligman*, is no authority whatever. Besides, Mr. Justice Bradley, in the last-mentioned case, clearly shows the duty of United States courts to harmonize their decisions in all instances, so far as possible, with the decision of the State courts. Our present case does not involve a question of *commercial* contract or negotiable security or bond, or general law applicable in all the States, such as insurance, fellow-servant law, etc., but involves a right only to land in a State and title thereto under a deed.

"It will be presumed that the Circuit Court in determining the validity of liens affecting property in its possession *will consider the decisions of the courts of the State in which the property is situated with the respect* which the decisions of this court requires." *Wabash Railroad v. Adelbert College*, 208 U. S., 38. See also *Hiscock v. Varick Bank*, 206 U. S., 28.

"While this court cannot refuse to exercise its own judg-

ment, it naturally will lean toward the interpretation of a local statute adopted by the local court." *Copper Co. v. Arizona Board,* 206 U. S., 474.

"The decision of a State court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law because its effect is to deny his claim to own such property." *Tracy v. Ginzberg,* 205 U. S., 170.

"This court must follow the decision of a State court in determining that the essential thing to transfer an estate is the exercise of a power of appointment." *Chanler v. Kelsey,* 205 U. S., 466. The West Virginia court construed its statute above quoted in connection with deed in Griffin case.

This court uniformly follows the decisions of the highest court of the State, in regard to the title to real estate and the construction of *deeds and statutes in respect thereto* (*Halstead v. Buster,* 140 U. S., 273; *Ridings v. Johnson,* 128 U. S., 212; *Grimley v. Clark,* 134 U. S., 338; *Clement v. Packer,* 125 U. S., 309; *Hamrick v. Patrick,* 119 Id., 156). This court followed the West Virginia case of *Bryan v. Willard* (21 W. Va., 65), "not only because it settles the law of the highest court of a State upon a question of title to real estate within its boundaries, which is *identical* with the question involved here, but also the decision is correct" in *Halstead v. Buster,* 140 U. S., 273. *One State decision there established a rule of property.*

In controversies concerning the title to lands, Federal courts administer the law of the case in all respects as if they were sitting as a State court in the State (*Slaughter v. Glenn,* 98 U. S., 242). The law of the State in which is situated the land concerning which the action is brought will be followed by the United States Supreme Court (*Davis v. Mason,* 1 Pet., 503).

It seems to be asserted by opposing counsel that when a contract has been entered into, or a right of action has ac-

crued, *before* the State court has construed the contract or passed upon the cause of action, the Federal courts are not precluded from passing upon those questions. We do not deny this proposition, nor do we believe that *any person* would deny it. Unquestionably the Federal courts can pass upon a question, whether the State court has done so or not. But when the highest State court has *already* passed upon the same questions in an identical case, the Federal courts sitting in the same State *do* follow the decisions of the highest State court, and this is because of the Judiciary Act of 1789 (ch. 20, § 34); and it would be the law independently of that enactment (22 Ency. Pl. & Prac., 324).

The mere fact that a contract (the deed here) *conveying realty* was made or a suit was *instituted* in a Federal court, or a cause of action had arisen before the decision of the question as to the construction of the contract by the highest State court, does not change this rule. If the State court decides *first* upon the true construction of such *contract conveying realty*, the Federal court will follow the State court, no matter when it took jurisdiction of a similar case (*Western Union Co. v. Poe*, 64 Fed., 9; *Stutsman v. Wallace*, 142 U. S., 293; *Roberts v. Lewis*, 153 U. S., 367). This rule is especially true in cases where the highest State courts have already construed instruments passing title to real estate within the particular State (*De Vaughn v. Hutchinson*, 165 U. S., 566; *Clark v. Clark*, 178 *Id.*, 186; *Brine v. Ins. Co.*, 96 *Id.*, 127; *Abraham v. Casey*, 179 *Id.*, 210). The questions involved in this case were not passed upon by the Federal circuit court until *after* a most careful consideration and adjudication of the same questions by the highest court of West Virginia. This case does not fall under the well-known qualification of the rule that the Federal courts follow the decisions of the highest State courts. The said qualification is thus stated in 22 Ency. Pl. & Prac., 330: "When contracts and transactions have been entered into and rights have accrued thereon under a particular state of

the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts *after* such rights have accrued." The highest State court *has not changed* its ruling upon the questions here involved, but it did pass upon the same questions *before* the Federal court; hence the clear inapplicability of the law just quoted. But, notwithstanding this, cases are referred to in a brief showing that the Federal courts were not bound to reverse their decisions rendered upon questions which were first decided by them and later decided contra by State courts, nor required to postpone their decisions to await a decision by a State court; and the said cited cases were mostly upon construction of a State statute, not, as in this case, upon a question of construction of an instrument giving title to realty; and no more applicable are the cases cited, holding that municipal bonds will not be rendered invalid by a change of decision by the highest State court, or by a contrary decision of the State court made after a Federal court had first decided that bonds were valid under a State statute. Those cases (such as *Douglass v. Pike County,* 101 U. S., 687; *Rowan v. Runnels,* 5 How., 134; *Burgess v. Seligman,* 107 U. S., 20) were decided upon a claim set up that property rights had been taken away without due process of law, contrary to the 14th amendment to the Constitution, because negotiable securities were rendered invalid by reason of a change of holding, or a different holding, by a State court as to constitutionality of State statutes under which the bonds were issued, and this, too, after the securities had gone into hands of innocent purchasers for value, who relied upon a former holding that the same statutes were constitutional. That is not this case. Besides, no claim has ever been made under the 14th amendment in any proper way, as required by

law (*Tennessee v. Bank,* 152 U. S., 454; 1 Desty's Fed. Proced., § 84, page 366).

And the cases cited to the effect that Federal courts will not follow State decisions on questions of general law, such as insurance, negligence, fellow-servants, or questions of general jurisprudence, are not applicable; for our case involves none of these questions, it being merely the question of the true interpretation of a deed conveying realty lying in West Virginia, which is a question of purely local law and such a question in the decision of which the Federal courts feel constrained to follow the previous decision of the highest State court. It must be borne in mind that the plaintiff did not anywhere claim (and he could not do so) that he has been deprived of property without due process of law, in violation of the 14th amendment, nor that he has been denied the equal protection of the law under the same amendment, nor that the obligation of any contract has been impaired. "Whether the obligation of a contract was impaired by a statute" (even) "as construed, is not open in this court if that objection was not taken below" (*Northern Assoc. Co. v. Grand View Assoc.,* 203 U. S., 106). The highest State court never changed its holding upon the question, nor came to a decision different from and after a decision by a Federal court. The plaintiff could not have had any vested property under any decision or any statute of West Virginia, because there was neither decision nor statute bearing on the subject; hence the decision in the Griffin case could not deprive plaintiff of any property. If he had no vested property, none could be taken away by virtue of the effect of any subsequent decision.

If any claim had been made that the obligation of a contract had been impaired by said decision, the answer would be that plaintiff had no such right as he claims given him under any contract or under any law of West Virginia when he made the deed in question; but if he had any such right under any contract, a mere decision of a court would not

be a "law" impairing the obligation of a contract. To have such effect, it must be a "law" in its true sense, one passed by a *legislative* body. A decision of a court is not a law within the meaning of the contract clause of the Constitution of the United States. That clause of the original Constitution "is aimed at the legislative power of the State, *not a decision of its courts,* or acts of executive or administrative boards or officers, or doings of private corporations or individuals" (*New Orleans Water Works v. La. Sugar Co.,* 125 U. S., 18. So, *Central Land Co. v. Laidley,* 159 U. S., 112; 145 *Id.,* 454; 153 *Id.,* 18; 163 *Id.,* 273).

We submit that the admission in opposing brief that Federal courts follow State decisions establishing a rule of property in the State has left the plaintiff without anything to stand upon in this court, for the decision in the Griffin case undoubtedly established a rule of property governing cases where deeds containing the *same* language convey coal. That case does not purport to pass upon or construe deeds for coal which contain language *different* from that found in the Griffin case. But the Kuhn deed is admitted to be exactly like the Griffin deed; hence that case does clearly settle the particular and narrow question there decided. It certainly cannot be said that the question passed upon in the Griffin case had been *otherwise* determined in West Virginia prior to that decision, so as to make the doctrine contended for by opposing counsel a rule of property in said State, nor can it be said that said doctrine was a "long-established local custom, having the force of law," in West Virginia; hence the inapplicability of such cases as *Griffin v. Overman Wheel Co.,* 9 U. S. Ct. Court of Appeals, 548.

In order to say that the doctrine contended for was a "law" establishing a rule of property, or a local custom having effect of a law, some judicial or legislative authority ought to be cited to that effect. In truth, no such question was ever before the legislature or courts of West Virginia until the deed involved in the Griffin case came before that court; and then for the first time the highest State court held that

that particular deed, or one containing identical language, conferred a right on the owner of the underlying coal to take it all out without liability for damages if the surface subsided by reason thereof. Until then there was no law and no local custom upon the subject in force in West Virginia. Only after the holding of the State court in the Griffin case could it be said that the narrow question therein decided had become a rule of property in that State; but it is respectfully submitted that *then,* by reason of the careful and elaborate consideration given to the case by five State judges, that case settled or established a rule of property, just as much so as if a dozen cases had been decided upon immature consideration by the same court. This being true, a Federal court will not hesitate to follow the Griffin case. In *Burgess v. Seligman,* 107 U. S., 20, it was held:

"But since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions rules are established which become rules of property and action in the State, and have all the effect of law—especially with regard to the law of real estate and the construction of State constitutions and statutes; such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is."

This being a "trial at common law" brought in a Federal court, and not a suit in equity, it falls directly within the language of the Judiciary Act of 1789, section 34; and a Federal court will follow the decision of the State court in the Griffin case, since said case lays down the "law" of the State of West Virginia upon the true construction of an instrument conveying real estate lying in that State. It seems to us that the Circuit Court could not possibly have rendered any different decision, in view of the whole law governing the matter. To have decided otherwise would have been to fly in the teeth of the settled adjudications of the Supreme Court of the United States, as well as the Circuit Court of Appeals for the Fourth Circuit.

The position taken by opposing counsel, that because this was an action of tort for injury done to real property, no question of *title* to real estate in West Virginia is involved, and that none such was involved in the Griffin case, is a strained effort to escape the firmly established rule of this court that it will follow the decisions of the highest State court upon questions of title to real estate in the State.

The decision in the Griffin case necessarily involved the construction of the deed of Griffin conveying the coal under his land in West Virginia and the mining rights therein contained. In order to see whether Griffin had any cause of action for injury to his surface land, the State courts were bound to examine the language of the deed conveying the coal and to adjudicate what *title* in said real estate Griffin and the Fairmont Coal Company had, respectively, by the terms contained in said deed.

If said deed passed to Fairmont Coal Company, not only *all* the coal underlying the land of Griffin, but also conferred the right upon said company to remove *all* of it without liability in damages if the surface subsided, then that finding, of necessity, involved the question of *title* to that coal and right to take it all under said title. Before the right of Griffin to recover damages was determined, the courts were compelled to examine the deed to ascertain a pure question of *title* to the coal and *title* retained by Griffin. If Griffin by the terms of his deed divested himself of all *title* to the coal and conferred the sole right upon his grantee to remove it all, then, as a matter of law, he was not entitled to recover damages by reason of the removal of the coal, no matter what the effect of such removal was. The Supreme Court of West Virginia considered it absolutely essential to inquire into the question of *title* and rights of both parties to that deed, else it could not determine the question of whether Griffin's declaration stated a good cause of action. It never was claimed or averred in the declaration that Fairmont Coal Company, in its mining operations, removed the coal in a *negligent* manner, but the declaration went upon the claim

that the mere careful removal of the coal, resulting in the sinking of the surface of Griffin's land, gave him a cause of action. Surely, for a court to investigate these questions of law it was necessary to pass upon the question of title to real estate under the terms of the deed. How else could a court determine the respective rights of the parties, and whether Griffin had stated a good cause of action in his declaration? Although both Griffin, in the State court, and Kuhn, in the Federal court, brought actions of trespass on the case, and not ejectment, yet before the legal rights of either could be ascertained it was absolutely requisite for both said courts to ascertain what title these grantors gave to Fairmont Coal Company by their deeds and what legal rights as to the coal were passed thereby. Involved in this inquiry was the question of title to real estate just as directly as if Griffin and Kuhn had brought actions of ejectment or writs of right, because the first and fundamental thing in order to sustain the declaration was to show *title* in plaintiffs, and this alleged title was one to real estate lying in West Virginia.

This being true, the Federal courts will follow the holding of the highest West Virginia court on this exact question made *before* the case of Kuhn was instituted in the Federal court, because that elaborately argued and carefully considered case had *settled* a question of *title* to real estate under a deed executed in said State.

For the foregoing reasons, in addition to those to be urged by my associates, it is respectfully submitted that the judgment of the Circuit Court, sustaining the demurrer to the declaration, was right, and therefore that—

The question certified to this court by the Circuit Court of Appeals for the Fourth Circuit should be answered in the affirmative.

Respectfully submitted,

EDWARD A. BRANNON,
Of Counsel for Fairmont Coal Company.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

No. [redacted]50.

BARTON W. KUHN, PLAINTIFF IN ERROR,

vs.

FAIRMONT COAL COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT CLARKSBURG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF HOMER W. WILLIAMS,
Of Counsel for Plaintiff.

J. W. Steele & Co., Pub., 16 N. Third, St. Louis.

SUPREME COURT OF THE UNITED STATES.

No. 242.

BARTON W. KUHN, PLAINTIFF IN ERROR,

versus

FAIRMONT COAL COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT CLARKSBURG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

STATEMENT OF THE CASE.

On the 1st day of November, 1889, Barton W. Kuhn, sold the coal under a tract of land containing about ninety-one acres to Johnson N. Camden. The deed contains the following granting clause: "The parties of the first part do grant unto the said Johnson N. Camden all the coal and mining privileges necessary and convenient for the removal of the same, upon and under a certain tract or parcel of land situated in the County of Marion, on the waters of the West Fork River, bounded and described as follows, to-wit: (Boundaries omitted.)

By subsequent conveyances the title to this coal passed to the Fairmont Coal Company, which company was the owner of the same, and was operating its mine and removing the coal at the time, and prior to the institution of this action, and

> "Wholly ignoring and disregarding the rights of the plaintiff did, knowingly, wilfully and negligently and without compensation therefor, or for damage arising therefrom, mine and remove all of the said blocks or pillars of said coal left as aforesaid (viz., by catacombing a certain area and then proceeding from the extreme part of the mine toward the opening, drawing the parts of coal left in the first instance for safety, as props.) And by reason of the mining or removal of the said blocks or pillars of coal as aforesaid, and by reason of the failure of the defendant to provide in any way, any proper, or sufficient support for the overlying surface of said land of plaintiff, the said land, or large portions thereof, was caused to fall," etc.

The case involves the law of subjacent support, and presents but one question:

THE STATE OF THE LAW ON THE SUBJECT.

This action was instituted on the 18th day of January, 1906. At that time every syllable of law in England and in all of the American States, where the question had been decided, without a solitary exception sustained the doctrine upon which plaintiff bases his action.

Every decided case everywhere holds that the right of subjacent support exists for the benefit of the surface owner, without any written provision, reservation, or saving to that effect.

While this case was pending in the court below, however, there was pending in the Supreme Court of West Virginia a similar case—Leander Griffin v. Fairmont Coal Company. This case was decided a few weeks prior to the final hearing of this case in the court below. As will appear from page three of the record, the Griffin case was instituted in the year 1902, but was not finally decided until March 27, 1906. This action was instituted on the 18th day of January, 1906.

GRIFFIN VS. FAIRMONT COAL CO.

The Griffin case was instituted in the Circuit Court of Harrison County, before Circuit Judge Mason, who filed an opinion which was copied into and chiefly composed the brief of defendant's counsel in the Supreme Court of West Virginia, and with the addition of one paragraph was adopted by the Court as and for its first opinion.

The opinion of Judge Mason frankly concedes that there is not a single case sustaining his view, but, he continues:

> "It would be much easier for me to do as other American Courts have done, and follow the English decisions without question or examination of the principles upon which they are founded, but I am so clearly of the opinion that those cases have been wrongly decided that I cannot follow them."

The Supreme Court of the State accepting and adopting, almost in its entirety, Judge Mason's opinion, overrules all cases both American and English without any principle of law for a guide; following no rule, except the arbitrary will, pleasure and power of the Court. The West Virginia Supreme Court in its first opinion expressly condemns, by naming the decisions of Alabama, Illinois, Iowa, New York, Pennsylvania and Ohio, and condemns also

New Jersey, Tennessee, Michigan and Virginia without express reference to them. It demolishes at one fell blow the entire system of English and American law on the subject. This, the opinion fully and expressly concedes. Counsel agree that the English Courts, the Pennsylvania, Illinois, Ohio, Alabama, New York, New Jersey, Indiana, Tennessee, Michigan and Virginia Courts have passed upon the question and that all sustain the doctrine of subjacent support.

Counsel agree that there is neither decision nor text on the subject, either in England or America, which does not state the rule in subjacent support to be precisely as plaintiff in this action contends.

THE STATE DECISION NOT BINDING ON THIS COURT.

At the time the cause of action arose, and at the time this action was instituted, the right to surface support was guaranteed under every system of jurisprudence in the English speaking world. If there is any law in West Virginia the effect of which is to relieve the subjacent owner from the duty of subjacent support, it dates from the decision of the Griffin case, which was decided after this action was instituted, and therefore cannot affect it.

There are two classes of cases in which Federal Courts are controlled by decisions of State Courts.

First: Questions involving the construction of the Constitution of statutes.

Second: Cases involving questions in which a rule of property has been established.

THIS CASE CANNOT BE CLASSIFIED UNDER EITHER.

Counsel did not in either the State Court or in the Court below claim exemption from the doctrine of subjacent

support under any statute of West Virginia. They will not make such claim in this Court because there is no statutory law in West Virginia on this subject.

In the second opinion of the Court in the Griffin case Judge Cox makes reference to section 2 of chapter 72 of the West Virginia Code. That chapter prescribes "Forms of Deeds and Covenants; Sales of Real Estate Under Deeds of Trust." Section 1 reads as follows: "A deed may be made in the following form or to the same effect: 'This deed, made the.....day of..... in the year....., between (here insert names of parties).' Witnesseth: That in consideration of (here insert the consideration) the said.....doth (or do) grant unto the said.....all, etc. (Here describe the property and insert covenants or any other provisions.)

Witness the following signatures and seal (or signatures and seals.)"

Section 2 reads:

> "Every such deed conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest whatever, both at law and in equity, of the grantor in or to such lands."

In the Griffin case Judge Poffinberger, in his dissenting opinion, refers to this section and says:

> "He quotes the statute as if it said 'every deed conveying land shall,' etc. This is not the language of the statute. Its language is 'every *such* deed conveying lands shall,' etc. It follows section 1 of chapter 72

which prescribed a simple form of deed to take the place of the cumbersome and verbose instruments by which lands were anciently conveyed. The purpose of the two sections was to dispense with common law requirements of a deed essential to the passing of the whole estate, or highest estate that a man could have, or may have, in the tract of land, or any other estate, title, or interest without describing it. If he had less than a fee simple title such a deed would pass it. If he had only an easement in it, such a deed would pass that interest. That statute simply enables the grantor to pass any interest or estate he may have in a tract of land by executing a deed to convey the whole estate. That is its purpose and its only purpose. How could this statute have any application to a deed which does not purport to pass the whole of a tract of land without exception?

By its very terms, it is only applicable when the deed conveys all of a tract without exception or reservation. When it does not purport to convey the whole tract, but reserves a portion of an estate or interest in a tract, or grants only a certain estate or interest in, or portion of, a tract, how could this statute have any application? It is generally in such deeds and contracts only that rules of construction have to be used, and this statute has no application to such deeds. If it is claimed that a deed, uncertain in its terms, does pass the grantor's title, or title to the land claimed under it, said section 2 has no application. It applies to nothing except a deed in form or effect like the deed prescribed in the preceding section. Hence, it is beyond my power to see how it can be deemed to have, in any way, lengthened, extended, or affected the rule of construction in question."

What application can that section possibly have to the case at bar? Nowhere can there be found the slightest hint of an attack upon the title of the Fairmont Coal Company for the coal it claims.

Under no possible construction or interpretation of the pleadings can that section of the statute be applied. There is not a section in that chapter of the Code which could not be quoted with as much relevancy as section 2. If it does anything it puts beyond doubt the principle that the word "all" in a deed is meaningless and superfluous.

The principle is well established that the grant of a thing carries with it the right to its beneficial enjoyment. If A grants a certain tract or parcel of land bounded and described he cannot make the grant stronger or better or larger by inserting the word "all." If he sells his horse he cannot do any more or give a better or larger title by selling all the horse, with the right to drive all the horse or to ride all the horse. If he grants the land the grantee gets it. If he sells the horse the vendee gets it. And the purchaser can use either howsoever he pleases, so long as he does not violate the golden rule of the law—"so use your own property as not to injure another."

An examination of the Griffin case, which defendant would use as a shield behind which to conceal the merits, will disclose two opinions, both by a divided Court. In the first it is frankly stated that all the law in England and America on the subject is wrong, and, therefore, should not be considered. On the petition for rehearing, however, a second, and what the court called a "more elaborate" opinion, was prepared, giving the same conclusion but stating a foundation for the conclusion at variance with the views expressed in the first opinion.

The first paragraph of the second opinion contains the text for the whole of it.

> "I concur in the conclusion reached by the court in this case. I have no quarrel with the doctrine of right of subjacent support, *when it has not been parted with,* applicable where the surface and subjacent estate in the same land are owned by different persons. I do not condemn or question what I deem the best considered cases and text-books expounding this doctrine. Owing to these facts, and to the very great importance of this case, I have concluded to prepare this opinion."

We have italicized the words in the paragraph which are made the text for the opinion, and which have on all occasions been the keynote of counsels' arguments.

We are prone to wonder what method counsel would use if they undertook to beg the question. They say defendant is not liable because plaintiff parted with his right to support, or transposing it, could as well be said, plaintiff parted with his support and defendant is not liable. *Therefore,* plaintiff should not recover because defendant is not liable.

PLAINTIFF DID NOT PART WITH RIGHT TO SUPPORT.

What greater estate passed to the grantee in this deed than would have passed under a deed conveying the entire estate with a clause reserving the surface to the grantor? Can it be contended that in such reservation the owner of the reserved estate would not be permitted to graze or cultivate it unless the right to do so be expressly given in the deed?

Let us assume that the deed of Kuhn to Camden had included the entire estate, and that on the next day or the

next year Kuhn had purchased the surface. What different relation would the two estates bear to each other than the one now existing? Would it have been necessary for the deed to have contained some such clause as: "But it is understood that only so much of said real estate is hereby granted as may not be taken, used, or destroyed by the party of the first part in the enjoyment of its coal or real estate adjoining and subjacent to the property herein conveyed?"

It certainly cannot be said that the defendant has a greater estate, a broader right, or a better license, under its deed than it would have, had it in the first instance purchased the absolute and entire estate and by subsequent deed parted with the surface.

In either case if the owner of one estate trespassed upon, or injured or damaged the other, the owner thereof must seek his relief in an action for damages, and section 2 of chapter 72 of the Code of West Virginia would no more apply than any other section in that chapter.

The owner of a fee simple estate in land has a six-sided property--a cube; he may sell any part of it he desires. It may be divided horizontally or perpendicularly, but the line of demarcation, whether horizontal or perpendicular, is, and must be, certain and distinct, and neither party can cross that line to the injury of the other. Nor can it be well said that one rule applies to four sides and another rule to the remaining two sides of the estate.

The deed under consideration did one thing and no more. It passed title to a certain parcel of real estate from Barton W. Kuhn to Johnson N. Camden. After its execution there were two separate and distinct estates; and title to each estate, so far as this case is concerned, is unassailable. So far as the pleadings show Kuhn's title to his estate is per-

fect just as the title of the Fairmont Coal Company to its estate is perfect.

The question is whether the owner of one estate injured and damaged the owner of an adjoining estate.

NOT A QUESTION OF TITLE.

This is an action of trespass on the case for tort. It is not a suit in equity or an action of ejectment. There is no issue under section 2 of chapter 72 of the statutes. That law can apply only when there is a dispute as to title. If the defendant can excuse itself under this statute, then A, whose farm adjoins B, can go to B's farm and destroy the timber upon it and can excuse himself by proving title to his own land. If defendant had destroyed plaintiff's home by blasting with powder or dynamite, could it by craving oyer of the deed for its coal be excused because, forsooth, it has a clear title for its coal?

Plaintiff does not attack defendant's title to the coal nor is he defending his own title to his land. Neither title is questioned, but title for the coal is not license to destroy the surface any more than title to the surface is license to the owner thereof to destroy the coal in order to get, use and enjoy the sand or clay beneath the coal.

The Griffin case does not construe a statute and this case cannot be placed under the first class of cases in which Federal Courts are controlled by State decisions.

NO RULE OF PROPERTY HAS BEEN ESTABLISHED.

A rule of property is a settled legal principle governing the devolutions and ownership of property. It must relate to and settle some principle of local law directly applicable to title.

The doctrine of rule of property, we submit, must have reference to property and tranactions included in and controlled by the statute of frauds. It can apply only to property the title to which passes by memorandum in writing. It must relate to title.

A score of people are injured in a railroad wreck through the fault of the railroad company. Fifteen of those injured sue the company in the State Courts and five, by reason of diverse citizenship sue in the Federal Court. Would the decision of the fifteen cases establish a rule of property? Would the Federal Courts consider the decisions of the State Courts unless some State statute had been construed? Or let us suppose that the injury had been to goods or property instead of to the persons. Would the decisions of the State Court in actions to recover damages be said to establish a rule of property? Could the defendant railroad defend by proving title to its right-of-way, its track or cars with the right to run the cars?

But if the injury upon which Kuhn's action is predicated were of such character that a rule of property could be established, the fact would still remain that the Griffin case does not so establish the rule. One case is not sufficient, especially when the one decision is made by a divided court.

> "A single decision of a State Supreme Court applying principles of common law to the solution of a question as to the validity of judgments does not establish a rule of property which is binding upon a Federal Court in a case where the rights of a party claiming under such a judgment became vested before the decision was made."

This language is found in the syllabus of Ryan v. Staples, reported in 23, C. C. A., at page 541.

Counsel will no doubt rely upon the authorities cited in the Court below to sustain their contention on the question certified to this Court.

These authorities without exception support the doctrine that United States Courts follow the decisions of State Courts in the two classes of cases we have mentioned, viz.: Cases involving the construction of a State statute, and in cases in which by a long line of decisions a rule of property has been established.

This doctrine we admit. There has not and is not now any contention about it. Counsel for defendant assert the doctrine; we admit it; they cite a number of cases to support it; the circle is complete; that which is admitted is proven and we are back to the point where we began.

If we were sueing in ejectment or in chancery, if we had assailed defendant's title, then the authorities which the defendant exhibits as a license permitting it to do the things about which the plaintiff complains, could be considered relevant, but if we sue for slander or libel or assault and battery or any other tort, we submit, the authorities cited are not relevant.

The first four cases cited by Mr. Vinson are:

Bucher vs. Cheshire R. R. Co., 125 U. S. 125;
Clark vs. Clark, 178 U. S. 186;
Palmer vs. Low, 98 U. S. 11;
Suydam vs. Williamson, 24 How. 427.

Bucher vs. Cheshire R. R. Co. was an action for damages for a personal injury caused by the negligence of the defendant. The action was first brought in the State Courts of Massachusetts, and a verdict was had for plaintiff. This was carried to the Court in banc, and was there reversed

and sent back for a new trial. The plaintiff then became non-suited in the State Court, and brought his action in the Circuit Court of the United States.

In the State Court defendant had set up as a defense a State statute which, by a long line of decisions, had been held a good defense, in fact was so held in every case until the legislature passed an act expressly providing it should not constitute a defense. The construction of the *statute* in that case was the only question in it.

Clark vs. Clark was a suit in equity involving the construction of a will that passed *title* to real estate in South Carolina and Connecticut.

Palmer vs. Lowe was an action of *ejectment* in California, and involved the question of *title* under a grant.

Suydam vs. Williamson was an action of ejectment in New York, involving title to real estate in New York City under a will.

Following these four are others, all of which have reference to one or both of the two classes of cases we have mentioned. One case seems to have had much consideration by Judge Dayton, which indeed seems to have been the authority upon which he sustained the demurrers to the declaration.

After citing other cases, he says: "But in addition to all of these authorities, I think the question decisively settled by the case of Foster vs. Elk Fork Oil & Gas Co., 90 Fed. Rep. 178."

An examination of that case shows that a farmer in West Virginia had leased his farm for oil and gas to Foster, who, by the terms of the lease, agreed to drill and complete a well within a certain time, or failing to do so, he

would pay a certain sum quarterly or annually as rental or commutation money for ten years, the term of the lease. A well was drilled which proved to be of no value and the territory was considered worthless for oil and gas purposes. The lease was then treated by both the lessor and lessee as void and abandoned. Before the ten years had expired the Elk Fork Oil & Gas Co., took a lease on the same property and began its developments. The territory this time proved valuable, and Foster laid claim to it under his old lease. Suit was brought in equity by the oil company praying an injunction to restrain Foster from interfering with its development.

It will be seen that this was a suit in chancery involving the naked question of title, and the West Virginia Court having in two cases—Crawford vs. Ritchie and Steelsmith vs. Gartlan—passed upon the question; the Federal Court followed those decisions. Had the owner of the farm brought an action against the defendant for damages to his growing crop, or to his orchard, timber, stable, stock or house, we would have a different question altogether, and the two decisions of the State Courts, we submit could not have been considered by the Federal Court.

Counsel did not in the Court below cite a case more to the point, or tending more to sustain defendant's contention than Foster vs. Elk Fork Oil & Gas Co. We have referred to it specially because, as above stated, it seems to have formed the basis of Judge Dayton's opinion. All the authorities cited refer to title and none have reference to actions of trespass on the case for damages.

NEITHER CLASS APPLIES TO THIS CASE.

There is another feature upon which we rely.

All the cases hold that decisions of a State Court, even when decided upon a statute or upon the principle of an

established rule of property, do not preclude the United States Court from passing upon the question of the contract out of which the cause of action arose was executed, or the right of action accrued *before the decision of the State Court.*

Kuhn's contract was made over sixteen years before the decision of the West Virginia Court. The cause of action arose and this action was instituted before that decision.

Perhaps the first case to go into this question at length was Swift vs. Tyson, reported in 16 Pet. 1:

> "United States Courts should not give the decision of State Courts a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States which in the judgment of this Court were lawfully made."
>
> Rowan vs. Runnels, 46 U. S. How. 134.

In the case of Griffin vs. Overman Wheel Co., reported in 9 U. S. C. Ct. of Appeals at page 548, this language is used:

> "Rev. St. Sec. 721 provided that 'The laws of the several States except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the Courts of the United States in cases where they apply.'
>
> The 'laws' of a State within the meaning of this statute, have been defined as 'the rules and enactments promulgated by the legislative authority thereof, or *long established* local customs having the force of law.' "

In Lawrence vs. Wickware, Fed. Cas. No. 8, 148-4, McLean, 56, it was held that a statute extending exemption from execution to articles not previously exempt was not applicable in a suit brought before the passage of the Act.

> "Where such a question (the construction of a State statute) is first raised in the Courts of the United States, and has been decided in a Circuit Court, the Supreme Court is not bound, on appeal, to reverse that decision, contrary to its own convictions, to conform to a State decision in the meantime."
>
> Pease vs. Peck, 18 How. 599.
> Town of Roberts vs. Bolles, 101 U. S. 119.

> "The hearing of a case involving such a question (the construction of a State statute) should not be postponed by a United States Circuit Court to await a decision of the question by a State Court."
>
> Burgess vs. Siligman, 107 U. S. 20.
> Detroit vs. Railroad Co., 55 Fed. 569.

> "Neither is the Circuit Court bound, on a bill of review, to reserve its decision under such circumstances; the ruling of the State Court does not operate retroactively."
>
> King vs. Investment Co., 28 Fed. Rep. 33.

> "The objection of the retroactive opinion of such subsequent decisions of the State Court applies, also, where rights have been acquired on the faith of the former interpretation, or of a previous ruling by a Federal Court."

Thus, in Groves vs. Slaughter, 15 Pet. 497, the Supreme Court held that—

"Certain contracts were not rendered void by a prohibition in the constitution of Mississippi, the question being regarded as an open one under the decisions of the State Courts."

See also Sims vs. Hundley, 6 How. 1.

So in more recent cases arising upon municipal bonds, on questions of construction of statutes authorizing such bonds, the Supreme Court has not considered itself bound by decision of the State Courts rendered after the bonds were issued or after the parties became the owners of the bonds.

Enfield vs. Jordon, 7 Sup. Ct. 538, 119 U. S. 680.
Bolles vs. Brimfield, 7 Sup. Ct. 736, 120 U. S. 759.
Barnum vs. Okolona, 13 Sup. Ct. 638, 148 U. S. 393.
Gibson vs. Lyon, 6 Sup. Ct. 129, 115 U. S. 439.

"On the question, also, of the liability of an individual owner of a lot in a city for injuries caused by a *dangerous and unguarded excavation* in the street in front of his lot, the Supreme Court declining to follow a decision of the local courts, on the ground that it was not bound thereby where private rights are to be determined by the application of common law rules alone."

The City of Chicago vs. Robbins, 2 Block 418.
Hill vs. Hite, 29 CC. A. 55 3-note.

"Where the controversy concerns a contract, and the meaning of the contract depends on the construction of a State statute or a provision of a State constitution, a decision of the meaning of the statute or the constitutional provision by the highest Court of the State, made after the contract was entered into and rights

vested thereunder, is not conclusive upon a Federal Court."

Central Trust Co. vs. Citizens St. Ry. Co., 82 Fed. 1.

"Where a contract is made before there has been any judicial construction of a State statute on which the contract depends, a Federal Court obtaining jurisdiction of a question touching such a contract, while leaning to an agreement with the State Courts, will not necessarily follow opinions of the State Court construing such statute if they were rendered after the rights involved in the controversy originated."

Louisville Trust Co. vs. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296.

"Federal Courts will exercise an independent judgment in determining the validity of a State statute under the State constitution in cases involving rights which arose under the statute prior to any decision of the State Court."

Jones vs. Hotel Co., 79 Fed. 477.

"A provision in a lease that the lessor shall not be liable for destruction of the premises through his negligence, *does not effect title to real estate,* within the rule that decisions of State Courts, constituting a rule of property, will be followed by the Federal Courts."

Hartford Fire Insurance Co. vs. Chicago, M. & St. P. Ry. Co., 62 Fed. 904.

"When contracts or transactions have been entered into and rights have accrued thereunder, before State laws applicable to them have been construed by the

State Courts, the Federal Courts will place their own interpretation on such laws though the State Courts have since adopted a different construction."

Bartholomew vs. City of Austin, 85 Fed. Rep. 359.

"The decision of the highest Court of the State passing upon the validity of a State statute under the State constitution is not binding upon the Federal Courts when thereby the validity of a contract, executed before there was a judicial construction of the statutes, between the citizens of the State and the citizens of another State is affected."

Jones vs. Great S. Fire Proof Hotel Co., 86 Fed. Rep. 370.

Same is held in

Speer vs. Board of County Commissioners, 88 Fed. Rep. 749.
Clapp vs. Otoe County, 104 Fed. Rep. 473; and
Southern Pine Co. vs. Hall, Fed. Rep. 84.

"The decision of a State Court should not be followed to such an extent as to make a sacrifice of truth, justice and law."

Faulkner vs. Hart, 82 N. Y. 416.

"The mere construction of a will by a State Court does not as the construction of a statute of the State constitute a rule of decision for the Courts of the United States."

Lane vs. Vick, 44 U. S. How. (11 Led. 681.)

"On a question not of local law but of general jurisdiction this Court will exercise its own judgment, uncontrolled by the decision of the several courts."

Lake Shore & Michigan Southern R. R. Co. vs. Prentice.

"A decision of a State Court upon the construction of a deed as to matters and language belonging to the common law and not to any local statute, although entitled to high respect, is not conclusive upon the Court."

Foxcraft vs. Mallett, 45 U. S., 4 How. 353.

The case of the United States Savings & Loan Co. vs. Harris et al., decided 1902, and reported in 113 Federal Report, page 36, is clear and conclusive:

"Under Rev. St. U. S., Sec. 721, requiring the Federal Court to be bound by and enforce the laws of the State in which the Court is sitting, such a Court is not bound, against its own judgment, to follow the decisions of the highest Court of such State, in determining the question as to what law governs a contract of loan between a building and loan association of one State and a member residing in the State in which the Court is sitting, secured by mortgage on land in the latter State; the adjudication of the State Court on the subject not being based on any local statute or constituting a rule of property situated within the State which the Federal Court is bound to follow."

Syl. Pt. 4.

"Where a building and loan association makes a loan and takes a mortgage on land in another State,

the contract being valid in the State or the domicile of the corporation, and after the loan is made, the Supreme Court of the State in which the land is situated, in a suit between those parties, such contract cannot be enforced in such State because usurious, a Federal Court in that State in an action to enforce such mortgage is not required to follow such decision when it believes the decision to be wrong."

In the body of the opinion, Judge Cochran says:

"But in addition to this there is another reason why this Court is not bound to and should not follow the decisions of the State Court. The relation between the plaintiff and the defendants out of which this suit has grown was entered into in August, 1892. The Harris case (the first of the two cases from the Kentucky Court of Appeals referred to above) was decided by that Court then three years afterwards—October 1, 1896.

This feature brings this case within a recognized exception to the rule that the Federal Court should follow the settled decisions of the highest court of a State when the case comes within either of the two classes stated above. That exception is thus stated in the oft quoted language of Mr. Justice Bradley in the case of Burgess v. Siligman, supra, to-wit:

'When contracts and transactions have been entered into, and rights have accrued thereon, under a particular State of decision, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law, applicable to the case, although a

different interpretation may be adopted by the State Courts after such rights have accrued.'"

The following language was used by Judge Goff in the case of King Iron Bridge Company vs. County Court of Harrison County, in August, 1892:

> "The Constitution of the United States and the Federal Fiduciary Act, give the people standing in this Court in its controversy with the defendant. I do not incline to the construction of the sections of the West Virginia Code, applicable to the matters involved in this suit, claimed and insisted upon by counsel for defendant, nor do I accept their construction of the discussions of the Supreme Court of West Virginia relative to the same. I do not think the statutes mentioned, nor the discussions alluded to, should be held to mean, that their effect is such as to prevent the plaintiff from beginning his suit in this Court. If that were so, I should disregard them, for as to that matter the constitution of the United States, and the law made in accordance therewith, would control. To hold, as I am asked by counsel for defendant to do, that the plaintiff should be, without exception, restricted to the mode and manner of procedure as is usual in the Courts of the State of West Virginia, under their practice, would in my judgment unwisely encumber the administration of the law, and tend to defeat the ends of justice in this tribunal. As far as possible the State practice will be followed, *but it will not be permitted to deprive this Court of its jurisdiction, and to take from this plaintiff the rights to which it is entitled by the laws of the State.*
>
> This is an action of assumpsit, an action broad in character, and as the elementary books tell us, "*ex*

æquo et bono," agreeable to what is good and right. It is in many respects like a bill in chancery, it appeals to the conscience, it seeks the right."

Respectfully submitted,

HOMER W. WILLIAMS.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 50.

BARTON W. KUHN, *Plaintiff in Error,*
Vs.
FAIRMONT COAL COMPANY, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

AT CLARKSBURG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF VINSON & THOMPSON, FOR FAIRMONT COAL COMPANY.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 242.

BARTON W. KUHN, *Plaintiff in Error,*
Vs.
FAIRMONT COAL COMPANY, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

AT CLARKSBURG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF VINSON & THOMPSON, FOR FAIRMONT COAL COMPANY.

STATEMENT OF THE CASE.

On the .... day of ....., 1889, Johnson N. Camden purchased the coal from Leander Griffin under a tract of land situate in Marion County, West Virginia, containing

sixty-eight acres, and took a deed of conveyance therefor. The granting clause of that deed is as follows:

> "The parties of the first part (Griffin and wife) do grant unto the said Johnson N. Camden all the coal and mining privileges necessary and convenient for the removal of the same, in, upon and under a certain tract or parcel of land situate in the County of Marion, on the waters of the West Fork River, bounded and described as follows, to-wit:"
>
> (Boundary lines omitted).
>
> "Together with the right to enter upon and under said land and to mine, excavate and remove all of said coal and remove upon and under said lands the coal from and under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described and make all necessary structures, roads, ways, excavations, air-shafts, drains, drainways and openings necessary or convenient for the mining and removal of said coal and the coal from coterminus and neighboring lands to market."

The coal so purchased by Camden from Griffin passed to the hands of the Fairmont Coal Company.

In 1902 Griffin, the grantor in said deed, instituted a suit in the Circuit Court of Marion County, State of West Virginia, against the Fairmont Coal Company, claiming that the removal of all of the coal was injuring the surface of the land which still belonged to Griffin and that he had a right to recover from the Fairmont Coal Company the damage which the surface had sustained by reason of its breaking and subsidence after the coal was removed, claiming that the defendant should have left sufficient pillars of coal or props in the mine to support the surface in its original condition. The plaintiff set out the deed in his declaration containing

the clauses hereinabove quoted. A demurrer was filed to the declaration, on the ground that the deed which was exhibited with the declaration showed that the defendant had a right to remove all of the coal *without* leaving pillars or supports for the surface. The *whole question in that case turned necessarily upon the construction of the deed and the language used in it.* The defendant had no right in the property at all other than that which the deed gave, and if there was no warrant in the deed for removing all of the coal, then the plaintiff should have recovered. If, however, upon a proper construction of the deed and the language used, there was vested in the defendant the right to remove *all* of the coal *without* leaving supports, then the plaintiff's declaration should be dismissed on the demurrer. The case was argued very extensively by counsel for both parties before Judge Mason of the State Circuit Court, and he held that a proper construction of the deed set out in the plaintiff's declaration vested in the defendant the right to remove *all* of the coal *without leaving supports,* and sustained the demurrer. From this opinion of Judge Mason's the case went to the State Supreme Court and was argued orally twice before that Court, once at Charlestown (in Jefferson County) at the September term of the Court, and again in the following January at the Charleston (Kanawha County) term of the Court. This second argument was made necessary by reason of the fact that after the case was argued at Charlestown two new Judges were elected and two of the existing Judges retired from the bench on the first of January. The Supreme Court of the State, in the opinion by McWhorter, setting forth the written opinion of Judge Mason, adopted it as the opinion of the Supreme Court of Appeals and affirmed the judgment of the lower Court in sustaining the demurrer, and consequently holding that a proper construction of the deed vested in

the defendant the right to remove *all* the coal without leaving supports for the surface. Judge Poffenbarger, one of the five Judges, filed a dissenting opinion, the other three concurring in the opinion of McWhorter. After this opinion was written out and handed down by the Court, a very elaborate petition for a rehearing was filed, which was duly considered by the Court and overruled, and the doctrine announced in that case is now the law of the State of West Virginia. Under the law of West Virginia the syllabus of the Court is made the law of the case, regardless of the reasoning of the Judges either for or against the principles laid down by the syllabus.

The syllabus in the Griffin case is as follows:

COAL LANDS—DEEDS—CONSTRUCTION OF.

"1. Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern.

COAL LANDS—REMOVAL OF COAL.

2. The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate and remove all of the coal purchased and paid for by him, and if the removal of the coal necessarily causes the surface to subside or break the grantor cannot be heard to complain thereof.

SAME—RESERVATION IN DEED.

3. Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land and to mine, excavate and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position.

CONTRACTS—CONSTRUCTION.

4. It is the duty of the Court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple and unambiguous.

SAME.

5. It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a Court may under the well established rules of construction interfere to reach a proper construction and make certain that which in itself is uncertain."

59 W. Va. Reports, page 480.

It will be seen that the decision of the Court turned absolutely upon the construction of this deed; and while it is true that the form of the action was *tort,* yet the decision of the Court was based exclusively upon the construction of this deed or contract for the sale and conveyance of lands. Not only is this law as announced by the Supreme Court of the State of West Virginia one that construes a deed for real estate between private parties, but it likewise is a construction of a statute of the State of West Virginia.

At page 488 the Court says:

> "Why not assume, at least *prima facie,* that the deed is correct; that it means just what it says when there is no ambiguity? When a deed on its face by plain and apt words conveys all the coal, why should the Courts say there is an implied reservation of part or perhaps of all of it, and that less than the whole, or in some cases nothing, is conveyed? The owner of property about to part with the title is at liberty to prescribe the terms

and conditions on which he will do it. The intention of the parties is presumed to be expressed by the language of the deed itself. If no reservations or exceptions are found in the deed, none should be presumed. The deed as the witness to the contract between the parties should speak the truth, the whole truth and nothing but the truth.

'The rule for the construction of deeds prescribed by our statute is:

Every such deed conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest, whatever, both at law and in equity of the grantor in such lands. Code, chapter 72, section 2.'"

Again in the concurring opinion of Judge Cox, at the top of page 504, he recites the above named statute; and also at page 516 the same section is referred to and construed, with a quotation from Professor Minor in his construction of a similar and, I might say, identical statute in the State of Virginia.

Between the time of the decision of the Supreme Court of Appeals in the Griffin case, to-wit, November, 1905, and the bringing of this suit, Kuhn vs. Fairmont Coal Company, to-wit, the 18th day of January, 1906, a petition for a rehearing in the Griffin case was filed. This petition for rehearing was overruled in March, 1906.

The Kuhn case, which is the one at bar, was brought by Kuhn against the Fairmont Coal Company in January, 1906, on identically the same cause of action as was alleged and set forth in the Griffin case. The deed in the Kuhn case was made to Johnson N. Camden and was subsequently transferred to the Fairmont Coal Company, and has identically the same language as the Griffin deed, and necessarily vested in the said Johnson N. Camden the same rights, title and interest and property that was vested in him by the Griffin deed, as the same identical language was used

in both of these conveyances, and as the Circuit Court of Appeals has said in its certificate, the two conveyances were made upon printed forms.

Kuhn, plaintiff, is a citizen of the State of Ohio; Fairmont Coal Company, defendant, is a citizen of West Virginia. The deed, which is the subject matter in this controversy, was made in West Virginia to lands lying in West Virginia, and there is no federal question whatever involved in this case. The only ground upon which jurisdiction of this case is vested in the United States Circuit Court is that of diverse citizenship between plaintiff and defendant. The defendant filed his demurrer to the plaintiff's declaration, and after argument, both oral and brief, the Circuit Court (Judge Dayton presiding) followed the decision of the State Supreme Court in the Griffin case and sustained the demurrer and dismissed the declaration. By examination of the opinion filed by Judge Dayton in that case, reported in 152 Federal, page 1013, it will be seen that his decision is placed upon the construction of the deed or contract upon which the suit is brought. He says in the syllabus:

> "Where the highest Court of a state decided that a deed to coal underlying certain land did not contain an implied covenant obligating the grantee to sustain the surface, such decision became a rule of property, which would be followed by the Federal Courts as to land located in such state when called on to determine the effect of a similar deed."

The fact that this was an action of tort does not change the issue at all, as the defendant was justified in doing the acts complained of *under the deed and the covenants contained in it that had been executed by the plaintiff.*

Judge Dayton says, at page 1014:

> "The first question for me to determine is

> whether I should follow the construction of this contract thus given by the Court of last resort of the state; for, if it is my duty so to do, under that construction, the plaintiff here will have no cause of action, and the demurrer must be sustained. It cannot be gainsaid that by the deed in controversy the plaintiff parted with his title to the coal underlying his land, and that, through this deed and subsequent conveyances, title to the same has become vested in the defendant company. This coal in its natural state is as much real estate as is the surface. This decision of the Supreme Court of Appeals of the State in the Griffin case containing precisely the same words of grant and covenant, must therefore be held to be one relating to the property right and title of the parties to real estate in West Virginia, and to establish the local law as to real estate so held."

From this decision of Judge Dayton sustaining the demurrer, the plaintiff sued out his writ of error and took the case to the Circuit Court of Appeals for the Fourth Circuit, and that Court has asked instruction of this Court and has requested it, under section 6 of the Act of March 3rd, 1891, to answer the following question:

> "Is this Court (Circuit Court of Appeals) bound by the decision of the Supreme Court in the case of Griffin vs. Fairmont Coal Company? We have an action by the plaintiff against the defendant for damages for tort, and this being an action for damages for tort, based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being in fact identical, that case having been decided after the contract upon which defendant relies was executed, after the injury complained of was sustained and after this action was instituted."

It would appear that the Circuit Court of Appeals has laid some stress upon the character of this action, the form of which being in tort, but whatever may be the form of the

suit, whether it be an action of covenant or a suit in equity or an action of tort, the fact still remains that *the issue involved*, and the *only issue*, is *the construction of a deed of conveyance between private parties*. If this deed of conveyance is to be construed according to the contention of the plaintiff, then he has stated a good cause of action and the demurrer should be overruled and the defendant required to plead. If, however, this deed should be construed as the Supreme Court of Appeals of West Virginia has construed it and as the Circuit Court of the United States has construed it, then it follows that the demurrer should be sustained and the Circuit Court of Appeals should affirm the decision of Judge Dayton in that behalf.

ARGUMENT.

IT IS THE DUTY OF FEDERAL COURTS TO FOLLOW THE DECISIONS OF THE HIGHEST COURT OF A STATE, IN CASES PENDING IN THE FORMER WHERE THE DECISION OF THE STATE COURT IS RENDERED IN ALL CASES.

(a) INVOLVING THE CONSTRUCTION OF A STATE STATUTE OR LOCAL LAW; AND

(b) IN CASES WHERE DEEDS AND GRANTS TO REAL ESTATE AND RIGHTS PERTAINING THERETO ARE TO BE INTERPRETED, WHEREIN NO FEDERAL QUESTION IS INVOLVED.

There is no contention that a Federal question arises on this record. The plaintiff does not claim any right, privilege or immunity arising under the constitution treatise or laws of the United States. The sole issue between the

parties is the construction of a deed conveying lands and interests therein from one private party to another. The defendant contended in the Griffin case that the deed under which it claimed vested in it certain rights and privileges that necessarily defeated the plaintiff's right of action. This contention was denied by the plaintiff, who insisted that a proper construction of the deed did not confer the power upon the defendant to remove all the coal without leaving supports for the surface. The construction of this deed was the only question before the Court and the only one considered by it. The deed conveyed the coal in fee simple, together with rights, privileges and easements for the enjoyment of the estate transferred. The extent of these rights and easements were set forth in the deed itself, which were defined by the Court in the construction it placed upon the language used by the grantor. This decision has established a rule of property, vesting in the grantee certain rights and powers for all persons similarly situated claiming similar rights and powers under similar deeds of conveyance.

The only reason why the U. S. Circuit Court could entertain this suit, is because the plaintiff is a citizen of the State of Ohio, while the defendant is a citizen of the State of West Virginia.

The fact that the deed under consideration was executed before the bringing of this action, and the decision in the Griffin case had been rendered, but not become final, cannot affect the duty of the Federal Courts to follow the decision of the State Court when identically the same question is presented to them. The following cases illustrate this proposition:

Hartford Ins. Co. vs. Chicago &c. Ry., 175 U. S. pp. 91-108.

At page 108 of the opinion the Court say:

"A second petition for rehearing was then filed and that case had not been finally decided by the Supreme Court of Iowa, when the present case came before the Circuit Court of the United States at April term 1894. The Circuit Court thereupon suspended judgment in this case; and at September term 1894—the state Court having meanwhile denied the second petition for a rehearing, and thereby finally affirmed the validity of the stipulation—followed the final decision of that Court, and gave judgment for the defendant. 62 Fed. Rep. 904.

The first opinion of the Supreme Court of the State of Iowa in the case of Griswold vs. Illinois Central Railroad was delivered after the agreement now in question was made. The final decision in that case, reversing the former opinion, was made after repeated arguments and full consideration; was nowise inconsistent, to say the least, with the decision or the opinion of that Court in any other case; and was rendered before the case at bar was decided in the Circuit Court of the United States. Under such circumstances, that decision, being upon a question of statutory and local law, was rightly followed by the Circuit Court."

Rowan vs. Runnels, 5 How. 134, 139;
Morgan vs. Curtenius, 20 How. 1;
Fairfield vs. Gallatin County, 100 U. S. 47, 52;
Burgess vs. Seligman, 107 U. S. 20, 35;
Bauserman vs. Blunt, 147 U. S. 647, 653-656, and cases there cited;
Williams vs. Eggleston, 170 U. S. 304, 311;
Sioux City Railroad vs. Trust Company of North America, 173 U. S. 99;
Wade vs. Travis County, 174 U. S. 499."

Wade vs. Travis County, 174 U. S. 499—Speaking of the binding force of a decision of the Supreme Court of Texas upon the Federal Courts, though rendered after the

case at bar had been taken to the U. S. Supreme Court, that Court said, page 506:

> "It is quite evident that if this case had been decided and called to the attention of the Courts below—Circuit and Circuit Court of Appeals—the validity of the bonds involved in this action would have been sustained, and the main question involved in this case is whether we shall give effect to this decision of the Supreme Court of Texas, pronounced since the case under consideration was decided in the Courts below, and giving, as it is claimed at least, a somewhat different construction to the constitution of the State.
>
> * * *
>
> (508) But assuming that the latter case was intended to overrule the prior ones, and to lay down a different rule upon the subject, our conclusion would not be different. In determining what the laws of the several States are, we are bound to look, not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them."

Citing

> Polk's Lessee vs. Wendal, 9 Cranch. 87;
> Luther vs. Borden, 7 How. 1, 40;
> Nesmith vs. Sheldon, 7 How. 812;
> Jefferson Branch Bank vs. Skelly, 1 Black, 436;
> Leffingwell vs. Warren, 2 Black, 599;
> Chirsty vs. Pridgeon, 4 Wall. 196;
> Post vs. Supervisors, 105 U. S. 667;
> Bucher vs. Cheshire Railroad Co., 125 U. S. 555.

If there be any inconsistency in the opinions of these Courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones. The case of United States vs. Morrison, 4 Pet. 124, seems to be directly in point. The

United States recovered judgment against Morrison, upon which a *fi. fa.* was issued, goods taken in execution and restored to the debtor under a forthcoming bond. This bond having been forfeited, an execution was awarded thereon by the judgment of the District Court, rendered April, 1822, which it was asserted created a lien upon the lands, and overreached certain conveyances under which the defendants claimed, dated February and March, 1823. The Circuit Court was of opinion that the lien did not overreach these conveyances. But the Court of Appeals of Virginia having subsequently decided that the lien of a judgment continued pending proceedings on a writ of *fi. fa.*, this Court adopted this subsequent construction by such Court, and reversed the decree of the Circuit Court.

In Green vs. Neal's Lessee, 6 Pet. 291, a construction given by the Supreme Court of Tennessee to the statute of limitations of that State having been overruled, this Court followed the later case, although it had previously adopted the rule laid down in the overruled cases. See also Leffingwell vs. Warren, 2 Black 599; Fairfield vs. Gallatin County, 100 U. S. 47.

In Morgan vs. Curtenius, 20 How. 1, the Circuit Court placed a construction upon an act of the legislature in accordance with a decision of the Supreme Court of Illinois with reference to the very same conveyance, and it was held that that, being the settled rule of property which that Court was bound to follow, this Court would affirm its judgment, though the Supreme Court of the State had subsequently overruled its own decision, and had given the act and the same conveyance a different construction. We do not consider this case as necessarily conflicting with those above cited."

PROPOSITION:

THE CONSTRUCTION OF DEEDS FOR THE TRANSFER OF LAND BETWEEN PRIVATE PARTIES, GIVEN BY THE HIGHEST COURT OF THE STATE IN WHICH THE LAND LIES, WILL BE ADOPTED AND

FOLLOWED BY THE FEDERAL COURTS, WHENEVER THE SAME QUESTION IS PRESENTED TO THEM.

> "The construction and effect of a conveyance between private parties is a matter as to which we follow the Courts of the State."

East Central E. M. Co. vs. Central Eureka Co., 204 U. S. p. 266, 272. Citing
Brine vs. Hartford Ins. Co., 96 U. S. 627, 636;
Devaughn vs. Hutchinson, 165 U. S. 566.

> "It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

Devaughn vs. Hutchinson, 165 U. S. p. 570;

Citing

United States vs. Crosby, 7 Cranch 115;
Clark vs. Graham, 6 Wheat. 577;
McGoon vs. Scales, 9 Wall. 23;
Brine vs. Ins. Co., 96 U. S. 627.

In the Devaughn-Hutchinson case, supra, the rule in Shelley's case was before the Court for interpretation. The land in question was in the District of Columbia, and formerly in the State of Maryland. The Court said:

> "Accordingly in the present case we are relieved from a consideration of the innumerable cases in which the Courts in England and in the several states of this union have dealt with the origin and application of the rule in Shelley's case.
>
> We have only to do with that famous rule as expounded and applied by the Courts of Maryland, while the land in question formed part of the territory of that state. And to further inquire whether

since the cession of the lands forming the District of Columbia there has been any change in the law by legislation of Congress."

This rule was considered and adhered to in the case of Brine vs. Hartford Insurance Co., reported in 96 U. S. p. 627-636, wherein the Court speaking of rules for the construction of conveyances, and the necessity for uniformity in both State and Federal Courts respecting the same, says at page 635:

> "If this be so, how can a Court whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of Courts and denied in the other, with no superior to decide which is right.

(Citing Olcott vs. Bynum et al., 17 Wall 44, Exparti McNeil, 13 Wall. 236.)

> The earliest utterance of the Court on the subject is found in the case of the United States vs Crosby (7 Cranch, 115), in which this explicit language is used: 'the court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated.' And in Clark vs. Graham (6 Wheat. 577) it said: 'It is perfectly clear that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situate.'
>
> In the case of McCormick vs. Sullevant (10 Id. 192), the Court held a will devising lands in Ohio, which was made and recorded in Pennsylvania, where the devisor resided, and which was otherwise perfect, inoperative to confer title in Ohio, because it had not been probated in that State,

as the law of Ohio required. 'It is an acknowledged principle of law,' said the Court, 'that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another.'

In the case of Watts et al. vs. Waddell et al. (6 Pet. 389), a question very much like the one before us arose. Watts was seeking to compel Waddell to accept a deed and pay for land which he had sold him many years before, the relief sought being in the nature of specific performance. It was objected that Watts could not convey a good title to a part of the land which he claimed to receive from the heirs of Powell by a decree rendered in the Circuit Court for the District of Kentucky. And although the proper parties were before that Court, and a conveyance had been made to Watts by a commissioner appointed by the Court, it was held that, as no statute of Ohio recognized such a mode of transferring title, the deed of the commissioner was wholly ineffectual. It will be seen that here was a Court of Equity, proceeding according to its usual forms, transferring title from one party to another, both of whom were before the Court, yet its decree held wholly ineffectual under the principle we are considering.

We will close these citations by using the language which had the unanimous assent of the Court in the recent case of McGoon vs. Scales (9 Wall 23): 'It is a principle too firmly established to admit of dispute at this day, that to the law of the state in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances.'"

The purpose of the Federal Courts to follow the decisions of the State Court upon local laws is so strong that the United States Supreme Court has frequently held that:

"THE FEDERAL COURTS WILL LEAN TOWARD AN AGREEMENT OF VIEWS WITH

THE STATE COURTS IF THE QUESTION SEEMS TO THEM BALANCED WITH DOUBT, A PRINCIPLE REINFORCED BY THE LATER CASES."

Tampa Water Works vs. Tampa, 199 U. S. 244;
Mead vs. Portland, 200 U. S. 163, citing
Burgess vs. Seligman, 107 U. S. 20;
Wilson vs. Standefer, 184 U. S. 399-412;
Bienville Water Co. vs. Mobile, 186 U. S. 212-220;
Chicago Theological Sem. vs. Illinois, 188 U. S. 662-674-675, 677.

It is to be noted that the cases immediately preceding involved questions other than those pertaining to grants and deeds of conveyance for the sale and transfer of lands. That all persons may have their land titles and the rights pertaining thereto secured by one uniform system of jurisprudence in the state where the land is situated, whether such persons reside in one state or another, it has become a necessity that the Courts of the United States should conform their decisions with respect to these particular subjects to those of the state. To do otherwise would destroy the stability of titles and make their validity depend upon the citizenship of the owner rather than uniform rules to be administered by all Courts, whether State or Federal.

I know of no case that more forcefully demonstrates the unwisdom of departing from State precedents and decisions than the one at bar. The interminable confusion that would result from such a course has been pointed out by Judge Dayton, who rendered the opinion of the Circuit Court in sustaining the demurrer in this case. That Court said:

"No better case, it seems to me, could be found to illustrate the wisdom of this rule, so uniformly upheld by Federal decisions, than the one at bar.

Suppose this Court should not follow the rule made by the State Court, but on the contrary hold the opposite? In such case, the right, title and interest of this Coal Company in and to the coal held by it under these contracts, with identical terms, would be wholly dependent upon the residence of the several vendors. So long as such vendor remained a citizen of West Virginia he would be bound by the decisions of the Courts of the State holding the company to have the unrestricted right to mine out and remove its coal in its entirety, regardless of damage done to overlaying surface. The moment he becomes a non-resident he could appeal to this Court, holding that the company's right, title and interest to this coal was limited by an enforcible implied liability to remove only so much thereof as could be safely done without danger to the overlaying surface.

The misfortune, if not the absurdity of such a situation makes uniformity of decision a necessity. The Supreme Court has wisely held that whether Federal Courts in such cases may prove or disapprove of the judgment of the State Court, they will nevertheless follow them."

THE CONSTRUCTION PLACED UPON THIS DEED IN THE GRIFFIN CASE BY THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ANNOUNCED NO NEW RULES OF INTERPRETATION OF DEEDS, BUT, ON THE CONTRARY, FOLLOWED STRICTLY A LINE OF DECISIONS OF THAT COURT, AND THE COURT OF APPEALS OF VIRGINIA MADE A LONG TIME PRIOR TO THE DATE OF THE DEED FROM GRIFFIN TO CAMDEN IN 1889. See

Hurst vs. Hurst, 7 W. Va. 339;
Snodgrass vs. Wolf, 11 W. Va. 158;
Barber vs. F. & M. Ins. Co., 16 W. Va. 658;
O'Brien vs. Brice, 21 W. Va. 704;
Gibney vs. Fitzsimmons, 45 W. Va. 334;
Long vs. Perrine, 41 W. Va. 158;

McDougall vs. Musgrave, 46 W. Va. 509;
2d Minor's Inst., p. 996, 1066-4-2;
Carrington vs. Goddin, 13 Gratt. 587;
Wilson vs. Langhorne, 102 Va. 631;
King vs. Norfolk & Western R. R., 99 Va. 625.

It will be noted that in the Griffin case the Court has in no wise changed any rule of law previously established, nor adopted rules of construction not in perfect harmony with its former judgments.

The Court holds that the owner of lands may sell the coal thereunder and grant the right to remove the same without requiring the grantee to leave support for the surface. 59 W. Va. p. 507.

This holding is in perfect accord with all the English decisions, as shown by MacSwinney on Mines. See 59 W. Va., p. 507.

The Court holds that the Griffin deed when interpreted by rules of construction adopted by the Court of Appeals of Virginia as long ago as 1857 and persistently followed by that Court ever since, and by the Supreme Court of Appeals of West Virginia since its first case arose in 1874, did grant and convey to Camden the right to remove all the coal without leaving pillars or supports for the surface.

The Court does not question the doctrine of subjacent support. Judge Cox says at page 496:

> "I have no quarrel with the doctrine of subjacent support *when it has not been parted with,* applicable where the surface and subjacent estate in the same land are owned by different persons. I do not condemn or question what I deem the best considered cases and text books expounding this doctrine."

The rule that deeds of conveyance will be construed *most strongly against the grantor;* and in the absence of

ambiguous language in the instrument itself, *the Courts will not write into these instruments new covenants and reservations which the parties expressly and intentionally omitted,* has been established and followed in Virginia and West Virginia by an unbroken course of decisions which have become rules of property in these States. To depart from these rules now would introduce confusion and disturbance in our land titles. This rule is the doctrine of the Supreme Court of the United States.

The following authorities are taken from the U. S. Supreme Court Digest, vol. 2, at page 1865, under title of

"CHANGE OF CONTRACT BY CONSTRUCTION."

> "238. The Court cannot import words into a contract which would make it materially different, in a vital particular, from what it is. Gavinzel vs. Crump, 22 Wall. 308."

> "240. No Court has power to change a contract or express the agreement of parties. Courts of Equity may compel parties to execute their agreements, but have no power to make agreements for them. Baltzer vs. Raleigh & A. Air Line R. Co., 115 U. S. 634.

> 241. Courts cannot incorporate into a sealed instrument any covenant for the expression of which language is entirely wanting in the instrument, and which cannot be legally implied from any other covenant therein, although the contract as expressed may seem much in favor of one party, and the omission of a covenant was clearly occasioned by mistake. Delaware & H. Canal Co. vs. Pennsylvania Coal Co., 8 Wall 276."

In the case of Hudson Canal Co. vs. Penna. Coal Co., 8 Wall. 276, in stating the case the Court said, at page 278:

"It was conceded by the Canal Company that

there was no express covenant by the coal company to transport even a pound of coal by the canal. The suit was founded, therefore, on the assumption that, according to the true construction of the agreement, there was imposed upon the coal company, in consideration of the obligations of the canal company, a correlative obligation on the coal company to send its coal by the canal alone, and that the obligation of the coal company in this respect was so plainly to be perceived in the contract that the Court would enforce it as *an implied covenant,* and as fully as though it were expressed in words."

Speaking of the contention of the complainant, at page 288, the Court says:

"Express covenant to that effect, it is conceded, is not to be found in the articles of agreement, but the plaintiffs contend that the obligation in that respect is so plainly contemplated by the agreement that the law will enforce it as an implied covenant as fully as if it were expressed in appropriate words."

At page 290 the Court lays down the following proposition:

"Courts of law cannot incorporate into a sealed instrument what the parties left out of it, even though the omission was occasioned by the clearest mistake; nor can they reject what the parties inserted, unless it be repugnant to some other part of the instrument, and none of the authorities cited by the parties in this case, when properly applied, are inconsistent with the views here expressed."

In the case of Gavinzel vs. Crump, in 22 Wall. at page 319, the Court says:

"The Court cannot, without evidence authorizing it to be done, import words into the contract which would make it materially different in a vital

particular from what it now is. There is no occasion to introduce parol evidence to explain anything in the contract, because there is no ambiguity about it, and it is not competent by this sort of evidence to alter the terms of a contract, by showing that there was an antecedent parol agreement or understanding between the parties different in a material particular from that which the contract contained."

In the case of Baltzer vs. Raleigh &c. R. R. Co., 115 U. S., the Court, at page 647, says:

> "As, therefore, the contract expressed the agreement of the parties, no Court has power to change it. Courts of Equity may compel parties to execute their agreements, but have no power to make agreements for them." Citing Hunt vs. Rousmaniere, 1 Pet. 1.

It is submitted that the Supreme Court of Appeals of West Virginia did nothing more in the Griffin case than apply these rules to the deed that was before them for construction.

THE GRIFFIN DECISION.

An examination of the case of Griffin vs. Fairmont Coal Company will develop the following facts, viz:

(1) It did not overrule, change or modify any previous decision or ruling of the Supreme Court of Appeals of West Virginia.

(2) It did not change or affect any previous or existing rights or interests fixed by or dependent upon any statute or judicial decision.

(3) It does not even have a tendency to impair the obligation of any deed or contract.

(4) It follows strictly the rules for construing deeds, that have been in existence ever since the organization of the Court of last resort, and which have been adhered to and followed in all its decisions.

(5) It deprived the plaintiff of no right secured to him by Federal law, contract, state statute or decision.

(6) It does not question the doctrine of surface support, but, in harmony with the best reasoning of other Courts and text writers, holds that *this right may be conveyed away like any other interest in land by apt and proper deed.*

(7) It specially holds that in the absence of ambiguity, doubt or uncertainty in the language used, a Court in an action at law, has no power to write new covenants into deeds of conveyance which materially change the rights of the parties to the instrument, but all such deeds must be given effect according to the plain and unequivocal terms used by the parties themselves.

This, then, is the decision which the plaintiff asks the Federal Courts sitting in the State of West Virginia to overturn. What infirmity is there in this case that he would ask this Court to correct? His complaint is that the Supreme Court of Appeals of West Virginia has declined to make a new contract for the parties; that it will not

read into their deed covenants which the grantor and grantee designedly omitted from it; that it will not set aside and annul a specific grant which the parties themselves have agreed to. If the principle that a Court may annul any part of a plain unambiguous contract be conceded, as the plaintiff contends, then there is no limit to the power of Courts to make agreements for private persons, and the sanctity of contracts will have no place in our jurisprudence.

THE QUESTION ASKED BY THE CIRCUIT COURT OF APPEALS.

In the certificate sent up by the Circuit Court of Appeals is a statement of facts upon which the instruction of this Court is asked. The doubt in the mind of that Court is based upon the fact that

(1) This "is action of tort," and
(2) The Griffin case was decided
  (a) "After the contract upon which defendant relied was executed" and
  (b) "after the injury complained of was sustained" and
  (c) "after this action was instituted."

Let us notice these matters in the order in which they appear in the certificate.

(1) ACTION OF TORT.

No rule of procedure is more firmly established in West Virginia than—

The trial of all actions for physical injury to lands, necessarily involves the title to the lands, for the plain-

tiff must allege and prove ownership in himself. His ownership or title is as much of an issue as the fact that an injury has been done. The defenses to such an action are: (a) The plaintiff does not own the property—has no title to it; (b) The defendant does own the land either by deed, lease or license, and therefore has a right to commit the trespass.

The cases which illustrate this rule are:

High's heirs vs. Pancake, 42 W. Va. 603;
Storrs vs. Feick, 24 W. Va. 606;
Ry. Co. vs. Rwy. Co., 47 W. Va. 725;
Wilson vs. Phoenix Powder Co., 40 W. Va. 413.

Many other cases might be cited to the same effect. The principle is established and illustrated by those cases where actions of tort have been brought for cutting and removing timber. In all such trials the title to the land is the first thing the plaintiff must establish, and every deed in his chain of title is the subject of judicial construction. Likewise, if the defendant undertakes to justify his act he must show his title, lease or license, and these instruments must receive a like judicial construction.

Whenever the defendant is not in actual possession, the action of trespass—tort—is as effective to try title to lands in West Virginia as the action of ejectment.

It will be noticed that the plaintiff in this action has in his declaration alleged both title and possession in himself. Equity has jurisdiction to restrain injuries to land in well defined cases. But complainant in equity proceeding must allege and prove title in himself, else his bill would be dismissed. If the plaintiff in this case had filed a bill in equity to enjoin the injury he has complained of, the issue would have been exactly the same as is presented in his action of tort, viz: the construction of the deed he

made to Camden conveying all of his coal and the right to remove it all. A demurrer to the bill in equity would have raised the same identical question as the demurrer to his declaration—the construction of this deed.

It is evident that the Circuit Court of Appeals overlooked the fact that the practice in West Virginia follows the old common law forms and has been modified but little by statute. That injuries to real estate may be prevented in equity, or redressed by recovery of damages in an action of tort, but whatever the form of the proceeding the issue involves a trial of title and an examination and judicial construction of title papers. *The rule that Federal Courts are not bound by the decisions of the State Courts in actions of tort has no application to injuries to real estate where questions of title and construction of deeds are necessarily involved,* although the form of the action be one of tort. This rule applies only to injuries to the person and to personal property.

(2) "(a) THE DECISION IN THE GRIFFIN CASE WAS MADE AFTER THE CONTRACT UPON WHICH DEFENDANT RELIES WAS EXECUTED."

This statement needs to be followed by another statement to the effect that at the time the contract was made (1889) there was nothing in the decisions of the Court nor the statutes of the State indicating different rules than those announced in the Griffin case. On the other hand, every principle announced and applied in that case had been established and followed by an unbroken line of decisions made *before* Kuhn executed his deed to Camden in 1889. The learned counsel for plaintiff do not claim that the Griffin decision changes or modifies any former ruling

of the Court made at any time, nor do they claim that any new rule of construction was adopted or established in that case different from anything that had gone before.

"(b) AFTER THE INJURY COMPLAINED OF WAS SUSTAINED."

The plaintiff in his declaration says that the injury occurred on the ..... day of ....., 1906. He instituted his suit on the 18th day of January, 1906. So he brought his suit immediately upon the happening of the injury complained of. This statement will be considered with the following paragraph (c):

"(c) AFTER THIS ACTION WAS INSTITUTED."

The Circuit Court of Appeals says—page 3 of the record—"That case (Griffin) was decided in November, 1905, —59 W. Va. 480."

Then the Court quotes Rule XII of the Supreme Court of Appeals of West Virginia, respecting petitions for rehearing, and say:

> "Where, under this rule, a petition is filed for a rehearing the judgment of the Court is held in abeyance, and there is no decision until the petition is acted upon, which in that case was not done until March 27, 1906, when a rehearing was refused —Cox, Judge, filing a concurring opinion and Poffenbarger, Judge, dissenting."

From the foregoing statement it appears that the decision, the conclusion, the finding, the judgment of the West Virginia Supreme Court, was announced, handed down and made public in November, 1905. The opinion was written out and handed down on that day, and the syllabus, which

is the law of the case, was then announced, and has never been changed nor modified by any subsequent proceedings. Kuhn knew of that decision as soon as it was rendered in November, 1905, for his counsel in this case was the counsel for Griffin in that case. He did not institute this suit for two months after that decision was rendered. The filing of a petition for rehearing does not change or alter the Court's opinion and judgment. The office of the petition is ended when it requests the Court for permission to point out defects in an opinion already rendered. I think the Circuit Court of Appeals is in error in saying that the filing of the petition suspends the judgment of the Court. The judgment of the Court is not suspended until the prayer of the petition is granted and reargument is ordered. The only effect of the petition is to withhold the mandate or formal order to the lower Court until the petition is acted upon. Petitions for rehearing may be filed as of right, without asking leave of the Court.

One party—Griffin—cannot change or affect the rights of another (Kuhn), not a party to the proceeding by filing or failing to file a petition for rehearing.

The rule that Federal Courts will exercise their own independent judgments upon local laws, where the State Courts have not spoken upon the particular subject can possibly have no application to the case at bar.

We have concluded to insert as part of this brief a copy of the brief which we filed before the Circuit Court of Appeals.

All of which is respectfully submitted.

VINSON & THOMPSON.

J. Taylor Vinson.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

BARTON W. KUHN,

Plaintiff in Error,

vs.

FAIRMONT COAL COMPANY,

Defendant in Error.

No. 747.

In error to the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg.

BRIEF OF VINSON & THOMPSON, FOR DEFENDANT IN ERROR.

Barton W. Kuhn, the plaintiff in error, instituted his action in the Circuit Court of the United States for the Northern District of West Virginia against Fairmont Coal Company, alleging in substance that the plaintiff had sold

to J. N. Camden the coal under a tract of land; that by conveyance from Camden the coal had become the property of the defendant Fairmont Coal Company, and that in removing the coal the defendant had not left pillars sufficient to sustain the surface in its original position, and that by reason of its failure to leave enough coal in the ground to support the surface, the surface had subsided and had been damaged by reason of the removal of the coal mentioned in the deed. The defendant craved oyer of the deed and demurred to the declaration. After argument before the Circuit Court, that Court sustained the demurrer on the authority of the case of Griffin against Fairmont Coal Company, decided by the Supreme Court of Appeals of West Virginia in November, 1905. From the decision of the Circuit Court in sustaining the demurrer and dismissing the plaintiff's declaration a writ of error was sued out and brought to this Court to review the judgment of the Circuit Court in sustaining the demurrer.

There are two questions presented by this record, viz:

> First: Will the United States Courts follow the decisions of the Supreme Court of Appeals of West Virginia in the case of Griffin against Fairmont Coal Company, reported in 59 W. Va., Reports, at page 480, under the command and authority of Section 721 of the Revised Statutes?
>
> Second: If not, then are the principles announced by that decision correct as general rules of law applicable to the State of West Virginia?

I.

In a case of this kind United States Courts are bound by the decisions of the highest Courts of the State.

Section 721 of the Revised Statutes of the United States provides:

> "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials of common law, in the Courts of the United States, in cases where they apply."

This act has been so often construed by the Federal Courts that there ought not at this day, remain any doubt as to what it means. By turning to Federal Statutes Annotated, vol. 4, page 519, we find the cases collected and the ruling of the Courts set forth. The following are taken as samples of the construction placed upon section 721.

> "Where a course of decisions has established rules of property as laid down by the highest Courts of the State, by which is meant those rules governing the descent, transfer, or sale of property and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal Courts."
>
> Bucher vs. Cheshire R. Co., 125, U. S. 583;
> Clark vs. Clark, 178 U. S. 186;
> Palmer vs. Low, 98 U. S. 11;
> Suydam vs. Williamson, 24 How. 427; and number of cases cited.
>
> "The local law of real property, as ascertained by the decisions of the State Courts, whether those decisions are grounded on the construction of the statutes of the State or form a part of the unwritten law of the State, which has become a fixed rule of property, is adopted by the U. S. Courts."
>
> Derby vs. Jacques, 1 Cliff. (U. S.—425.)
>
> "The construction and application of mort-

gages on property situated within a State, as determined from the decisions of the State Courts, is a rule of property within that State."

New York Security Co. vs. Lombard Investment Co., 65 Fed. Rep. 271.

"The order in which parcels of land shall be sold, on foreclosure of a mortgage, is governed by the decisions of the State Courts."

Orvis vs. Powell, 98 U. S. 177.

"If there be any inconsistency in the opinions of the State Courts, the general rule is that the Federal Courts will follow the latest settled adjudications in preference to the earlier ones."

Wade vs. Travis County, 174 U. S. 508;
Stutsman County vs. Wallace, 142 U. S. 293;
and numerous other cases cited.

"In determining what the laws of the several States are, which will be regarded as rules of decision, we are bound to look not only at their constitutions and statutes, but at the decisions of their highest Courts giving construction to them."

Wade vs. Travis County, 174 U. S. 508.

"The Federal Courts show their respect for, and deference to, the settled decisions of the highest Court of the State, so far as to follow them blindly, as it were, in two well recognized classes of cases. One class is where the matter decided relates to the interpretation or validity of the written or statutory laws of the State, if the Federal constitution is not involved. The other class is where the matter decided relates to the acquisition, or not, of rights to, interests in, or liens upon property located within the State, even though the acquisition, or not, depends solely upon the unwritten law of the State. Often the cases which arise belong to

both classes; the acquisition, or not, of such rights, interests, or liens depending upon the interpretation or validity of some statute."

U. S. Savings Co. vs. Harris, 113 Fed. 27.

This question has been before the Circuit Court of Appeals of this circuit in the case of Foster vs. Elk Fork Oil & Gas Co., reported in 90 Fed. Rep., at page 178. The Court rendering the decision was composed of Judges Simonton, Morris and Brawley. The opinion was written by Judge Simonton. Syllabus 2 in that case is as follows:

"The decisions of the Courts of a State as to the construction and effect of mining leases therein establish a rule of property which will be recognized and followed by the Federal Courts."

The Court in discussing the question, at page 182, says:

"The contract we are construing is a contract made and to be performed in West Virginia. It is a contract relating to land in that State. The cases quoted laid down a rule of property, stating the controlling doctrine peculiar to mining leases in that State. The Federal Courts recognize and follow the decisions of Courts of last resort in the State."

It was decided by this Court, at the same term, in the case of Wheeling Bridge & Terminal Ry. Co. vs. Reymann Brewing Co., reported in 90 Fed. Rep., 189, as follows:

"By analogy to the rule in regard to limitations, Federal Courts should follow the decisions of a State Court as to laches affecting rights relating to the title or possession of realty therein."

After reciting what the law of West Virginia is in the opinion of the Court, the Court says, at page 195:

"And this is the law in West Virginia. * * the Federal Courts follow the decisions and law of

> the State as to the Statute of Limitations (Dibble vs. Land Co., 163 U. S. 65), and, by analogy should follow them as to laches. This is a question affecting the title and possession of real property, in which Federal Courts follow the State Courts. Bucher vs. Railroad Co., 125 U. S. 583."

The Supreme Court of the United States in the case of Traction Co. vs. Mining Co., reported in 196 U. S. 239, giving expression to the idea that there should be harmony between the decisions of the State and Federal Courts respecting the rules of property within the State, says:

> "The exercise by the Circuit Courts of the United States and the original jurisdiction thus conferred upon them is pursuant to the Supreme Law of the land, and will not, in any proper sense, entrench upon the dignity, authority or autonomy of the States; for each State, by accepting the Constitution, has agreed that the Courts of the United States may exert whatever judicial power can be constitutionally conferred upon them. *In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties,* is, for every practical purpose, a *Court of that State.* Its function, under such circumstances, is to *enforce the rights of parties according to the law of the State,* taking care, always, as the State Courts must take care, not to infringe any right secured by the Constitution and the laws of the United States."

In the case of Hartford Ins. Co. vs. Chicago &c. Ry. Co., 175 U. S., at page 100, the Supreme Court of the United States says:

> "Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the

> principles of the commercial and mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest Court."

Citing a great number of cases from the Supreme Court decisions.

We might cite cases from almost every one of the Federal Reporters construing Section 721, but we do not deem it advisable to do more than refer the Court to the preceding cases as illustrating the doctrine that the Federal Courts will follow decisions of the highest Courts of the State that have become rules of property. This Court has already construed that statute and placed itself in line with the general trend of authorities, both in the Supreme Court as well as the subordinate Federal Courts.

In the cases of Foster vs. Elk Fork Oil & Gas Co., and Wheeling Bridge Terminal & Ry. Co., vs. Reymann Brewing Co., reported in 90 Fed.—in the first of these cases this Court has said, in substance, that the construction placed upon mining leases by the Supreme Court of Appeals of West Virginia established therein a rule of property which this Court would follow, and it must necessarily follow that the construction which the Supreme Court of Appeals of West Virginia has placed upon deeds conveying real estate is likewise a rule of property and will be followed by this Court, whenever the same or similar instruments come before you for interpretation.

The reasons for this comity between the State and Federal Courts are reasons of necessity in addition to the mandatory provisions of Section 721, and they have been so aptly expressed by Judge Dayton in the opinion in this case that we can do no better than to use his own language, which is as follows:

> "No better case, it seems to me, could be

found to illustrate the wisdom of this rule, so uniformly upheld by Federal decisions, than the one at bar. Suppose this Court should not follow the rule made by the State Court, but on the contrary hold the opposite? In such case, the right, title and interest of this Coal Company in and to the coal held by it under these contracts with identical terms, would be wholly dependent upon the residence of the several vendors. So long as such vendor remained a citizen of West Virginia he would be bound by the decisions of the Courts of the State holding the company to have the unrestricted right to mine out and remove its coal in its entirety, regardless of damage done to overlying surface. The moment he becomes a non-resident he could appeal to this Court, holding that the company's right title and interest to this coal was limited by an enforcible implied liability to remove only so much thereof as could be safely done without danger to the overlying surface. The misfortune, if not the absurdity of such a situation makes uniformity of decision a necessity. The Supreme Court has wisely held that whether Federal Courts in such cases may prove or disapprove of the judgment of the State Court, they will nevertheless follow them."

See also North Carolina M. Co. vs. Westfield 151 F. 290; Troy Wagon Co. vs. Hancock, 152 F. 605.

It will be borne in mind that the deed in the Griffin case is identical with the deed in this case—taken about the same time, in the same vicinity, to the same grantee, using the same language, concerning the same character of property—coal. The only difference is the personnel of the grantors. The grantee's right to mine and remove the coal — the subject matter of the conveyance — is expressed exactly in the same phraseology. In the Griffin case the Supreme Court of Appeals of West Virginia decided that the deed executed by Griffin gave to Camden, the vendee, and his assigns the right to mine and remove the

coal he had purchased, without leaving pillars to support the surface. Griffin was a citizen of West Virginia and had to bring his suit in the State Court, which held that he had no cause of action. If this plaintiff, Kuhn, who is a citizen of the State of Ohio, had instituted this action in the State Court, that tribunal would say to him that he had no cause of action; but, by reason of his residence in another State, he goes into the United States Courts and asks those tribunals to give him what the State Court had denied to Griffin, on identically the same cause of complaint. In other words; he wants a different rule of property for non-residents than that vouchsafed to citizens of the State, growing out of the same contract and conveyance. It is confidently believed that this Court will do no such absurd thing as he requests of it and that the judgment of the Circuit Court in sustaining the demurrer will be affirmed.

Since writing the foregoing part of this brief we have received the brief of Mr. Homer W. Williams, of counsel for plaintiff in this case, and owing to the number of decisions cited by counsel for the plaintiff we deem it expedient to call the Court's attention to some of the cases referred to.

On page 9 of the brief is the citation of Swift vs. Tyson, 16 Pet. 1. This was a suit brought to collect a bill of exchange against an endorser. And the Court in that case held that:

> "The 34th section of the Judiciary Act is limited to the laws of a State strictly local, that is to say, the positive statutes of the State and their interpretation by the local tribunals, and the rights and titles to things having a permanent locality, such as real estate; it does not apply to the construction of contracts, or to questions of general commercial law."

The Court says, at page 19 of that case:

> "In all the various cases, which have hitherto

> come before us for decision, this Court has uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

In the case of Roberts vs. Bolles, 101 U. S. 119—this was a case involving the validity of a municipal bond issue under authority of a statute of the State of Illinois. It appears from that case that the decision of the State Court was made three years after judgment was rendered in the Federal Court, and the United States Supreme Court in this case decided it upon an entirely different section of the statute, which had not been construed and passed upon by the State Court.

Syllabus 3, at page 120, is:

> "Williams vs. Town of Roberts (88 Ill. 1), decided three years after the judgment now under review was rendered, is not accepted by this Court as conclusive against the validity of the bonds; for the Supreme Court of Illinois, while holding the election to be void, does not refer to said section 5, nor to the precise question upon which their validity is sustained here."

It will be noted that the Federal Courts have never assumed to follow the decisions of the State Courts blindly in matters relating to general jurisprudence, and especially commercial law and the law of negotiable instruments; and of course municipal bonds are commercial instruments and are nearly always made payable to bearer.

Case of Sims vs. Hundley, 6 How. 1, cited on page 11 of the brief. The Court in that case holds:

> "The rules of evidence prescribed by the laws

of the State are to be administered by the Circuit Court sitting in the State in a trial of civil action at common law."

Case of Hartford Fire Insurance Co. vs. Chicago M. & St. P. Ry. Co., 62 Fed. 904.

This case arose upon the proper construction of a clause in a contract of insurance, in which there was a contention that the contract was contrary to public policy and therefore void.

The Court at page 906 said:

"The effect upon the validity or enforceability of a contract, of the fact that its provisions are admittedly contrary to public policy, would be a question of general law, upon which this Court must exercise its own judgment. In fact, however, this Court and the Supreme Court of Iowa are in accord upon this question of general law, and in both forums it is held that a contract contrary to public policy is invalid.

* * * *

The nature of the subject-matter determines the source from which light must be sought upon the question of fact whether the provisions of a given contract are or are not contrary to public policy. In other words, there is a public policy of the nation, applicable to all matters wherein the people at large are interested, * * * and also a state public policy adapted to the circumstances of the locality embraced within the boundaries of the state and applicable to all matters within state control. * * * In seeking to ascertain the requirements of the public policy of the nation, the principal sources of information are the constitution of the United States, the statutes enacted by Congress, and the decisions of the Courts, Federal and State, and in case there should be a divergence in the views of the Federal and State Courts upon a question of national public policy, the conclusion reached in the Federal Courts must be accepted as

the best evidence of what the requirements of the national public policy are. On the other hand, when seeking to determine the public policy of the State towards a subject within State control, the principal sources of information are the State constitution and statutes and the decisions of the Courts, State and Federal; and, in case of a divergence between them, the decisions of the State Court must be accepted as the best evidence of the public policy of the State.

* * * *

On behalf of the defendant it is argued that the lease and the stipulations therein contained create or convey a title to real estate, and thus form part of a subject-matter clearly within State control. I am not prepared to go to this extent in construing the subject matter of the contract between the parties. *The lease, as a whole, creates and conveys a title to real estate; and if the question at issue was one touching the title conveyed, it would come within the rule that the decisions of the State Courts, which constitute a rule of property, will be accepted and followed by the Federal Courts."*

Jones vs. Hotel Co., 79 Fed. 477, page 12 of the brief.

This was a case which arose under a statute creating a lien upon property and rights accruing under that statute, which were subsequently amended, and the State Courts had given different and contrary constructions to this statute. The Court in that case said:

"3. The rule that, where there are conflicting decisions of a State Court as to the construction or validity of a State statute, the early decisions will be followed by the Federal Courts as to all rights accruing under them before the last decision has no application where the latter decision is under an amendment of the statute, constitut-

ing it a radical departure from previous legislation."

Bartholomew vs. City of Austin, 85 Fed. 359.

This was a case arising upon the proper construction of a contract between the City of Austin and the Water Works Company. The Court in that case quotes with approval from the case of Burgess vs. Seligman, 107 U. S. 32, the following:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not sub-ordinate to, that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitution and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritive declarations of what the law is. But, where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment, as they also always do

in reference to doctrines of commercial law and general jurisprudence."

And the Court in that case said:

"Applying the principles thus declared in Burgess vs. Seligman—which by the way has never been questioned in the Supreme Court."

In the case of Clapp vs. Otoe County, 104 Fed. 473, which was a Circuit Court of Appeals' decision from the Eighth Circuit, syllabus 2 says:

"The National Courts uniformly follow the construction of the constitution and statutes of a State given by its highest judicial tribunal in all cases that involve no question of general or commercial law and no question of right under the constitution and laws of the nation.

3. The question whether or not the illegal action of a municipal or quasi municipal body, in the exercise of a power granted to it, constitutes a defense to bonds issued pursuant to such action, and held by a bona fide purchaser, is a question of general jurisprudence, which the National Courts must determine for themselves."

It will be noted that the rule is universal in the Federal Courts—which is thoroughly established by authorities cited by counsel for plaintiff—that decisions of State Courts establishing rules of property, titles and interest in real estate, will always be followed by the Federal Courts. The attempt is made by counsel to argue that the decision in the Griffin case does not establish a rule of property, nor would the decision in this case; because, forsooth, these are actions of damage for injury to property. But the defense made and the issue passed upon and decided was, whether or not the deeds made to the coal under the lands

alleged to have been damaged conveyed and transferred the right to the grantee to inflict such reasonable damage to the surface as was necessary to remove the coal which he had purchased and paid for, this right being specifically granted by the deed—as was held in the Griffin case—has vested in the grantee, by operation of the law relating to real estate, the right claimed by the defendant, and of course every other plaintiff and every other defendant similarly situated would have their rights and titles interpreted according to the rule laid down in the Griffin case. The right to remove the coal is just as essential to the grantee as the right to purchase it or have the title thereto vested in him. And it is confidently asserted that the cases cited by counsel for plaintiff established the doctrine for which we contend.

II.

The decision of the Supreme Court of Appeals of West Virginia in the Griffin case is right. The following is the syllabus:

1. "Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern.

2. The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate and remove all of the coal purchased and paid for by him, and if the removal of the coal necessarily causes the surface to subside or break the grantor cannot be heard to complain thereof.

3. Where a deed conveys the coal under a tract of land, together with the right to enter upon and

under said land and to mine, excavate and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position.

4. It is the duty of the Court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple and unambiguous.

5. It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a Court may under the well established rules of construction interfere to reach a proper construction and make certain that which in itself is uncertain."

The foregoing principles have been so thoroughly established that they have become fundamental, and to question them would be to introduce elements of doubt and confusion in the construction of any and all written instruments, no matter how plain and simple they may be.

The clause in the deed from Kuhn to Camden, which was construed in the Griffin case is as follows—after granting the coal:

> "Together with the right to enter upon and under said land, and to mine, excavate and remove all of said coal and remove upon and under said land the coal from under adjacent, co-terminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described, and make all necessary structures, roads, ways, excavations, air shafts, drains, drain ways, and openings necessary and convenient for the mining and removal of said coal and the coal from co-terminous and neighboring lands to market."

It is earnestly insisted that the rights given to the defendant by this clause in the deed are plain, simple and

unambiguous, although in the dissenting opinion of Judge Poffenbarger in the Griffin case the whole foundation of his argument is based upon the theory that this language is ambiguous and there should be read into the deed a clause changing its meaning and giving an entirely different intention to the parties than that which is plainly manifest by the words used.

Our answer to the dissenting opinion is, that the ambiguity assumed—or more properly speaking, imagined—by that learned Judge does not exist, and it became and was the plain, simple duty of the Court to enforce that deed and contract as the parties themselves had made it.

The ruling of the Supreme Court of Appeals of West Virginia in the Griffin case, as shown by the opinions of Judges Cox and McWhorter, writing for the majority of the Court, is unquestionably sound and correct on reason and authority. The arguments presented by these distinguished Judges of the Supreme Court, as well as the original opinion of Judge Mason of the Circuit Court, in our judgment, cannot be improved upon or strengthened by anything that we might say in addition thereto.

It will be remembered that in that case there were two oral arguments presented to the Supreme Court, one at Charlestown in September and the other at Charleston in January. This was made necessary by reason of the fact that two members of the Court, to-wit, Judges Cox and Sanders, were not on the bench at the Charlestown hearing, but had been elected and were members of the Court before the decision was rendered and it was desired to have oral argument for the benefit of these Judges.

Before Circuit Judge Mason, as well as the Supreme Court, the defendant, Fairmont Coal Company contended for the following five propositions:

1. Deeds conveying coal with rights of removal

should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself is to govern.

2. The owner of lands may sell and convey his coal and give to the vendee the right to mine and remove all the coal purchased and paid for by him, and if the removal of the coal necessarily causes the surface to sink or break, the grantor cannot be heard to complain of an injury by the exercise of a right which he had sold to and vested in the purchaser.

3. Where a deed conveys the coal under a tract of land, together with the right to mine and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position. The grantee or his assigns under such an instrument has the right to remove all the coal purchased by him, without responding in damages for the breaking of the surface if the taking of coal necessarily causes the surface to sink or break.

4. While this Court should consider with respect the decisions of the Courts of England, yet it cannot follow such decisions when they are not in harmony with our institutions, the principles applicable to the State of the country, and the condition of society. Especially will such decisions not be followed when they are based upon conditions that could not exist in this country, and would produce confusion and result in the perpetuation of error.

5. It is the duty of the Court to construe contracts as they are made by the parties, and give full force and effect to the language used, whenever it is plain, simple and not ambiguous. The Court has no power to make contracts for people, nor write qualifying clauses therein, which the parties themselves have omitted.

These five propositions were attempted to be sustained in part by the following course of argument in that case, which is taken from our brief filed therein:

LEANDER GRIFFIN, *Plaintiff.*
FAIRMONT COAL COMPANY, *Defendant.*

BRIEF FOR FAIRMONT COAL COMPANY, DEFENDANT IN ERROR.

This was a suit brought by the plaintiff, Leander Griffin, in the Circuit Court of Marion County against the Fairmont Coal Company. The action was trespass on the case. The plaintiff's declaration sets forth that he sold to J. N. Camden, sixty-eight acres of coal. The deed of conveyance for the coal was made by the plaintiff on the first day of November, 1889, and in the deed was a reservation of three acres. This deed is in substance set out in the declaration, and contains the following provision:

> "The party of the second part and his assigns is to have the right of way through said reservation for a road, air-course and tram-way, necessary or convenient for the mining and removal of said coal and the coal under co-terminous and neighboring lands, together with the right to enter upon and under said land and to mine, excavate and remove *all* of said coal and remove upon and under said land the coal from under adjacent, co-terminous and neighboring lands, and also the right to enter upon the tract of land hereinbefore described and make all necessary structures, road ways, excavations, air shafts, drains, tram-ways and open-

ings necessary or convenient for the mining and removal of said coal and the coal from co-terminous and neighboring lands to market."

(See record, page five.)

The substance of the plaintiff's allegation is that the defendant operating under this grant took away the pillars of coal that had been left originally to sustain the surface, and that the taking away of the pillars caused the surface of the land to sink and break and divert the water, and it is for this injury that the suit was brought.

To this declaration the defendant entered a general demurrer, as well as a demurrer to each count thereof. The question of law arising upon the demurrer is, whether or not the sale of the coal made by the plaintiff to J. N. Camden, the defendant's grantor, carried with it the right to mine and remove *all* the coal under the sixty-eight acres, or whether it carried with it the right to remove *only such portions* as could be removed, leaving enough to support and maintain the surface in its original condition. This demurrer was argued both orally and upon briefs before Judge Mason, the Circuit Judge, and upon sustaining the demurrer that learned Judge gave a written opinion, which was filed with the papers in the case, but which has not been copied into the record. That written opinion is as follows:

LEANDER GRIFFIN, *Plaintiff.*

vs. Trespass on the case.

FAIRMONT COAL COMPANY, *Defendant.*

This is an action of trespass on the case brought by Leander Griffin, plaintiff, against the Fairmont Coal Company, defendant.

The declaration alleges that the plaintiff on the——

day of....., 1902, was the owner in fee of a certain tract of land, situated in Harrison County, and fully described by metes and bounds, containing about 68 acres, and that underlying the surface of said land there is a vein of coal, which coal (except about three acres) the plaintiff and his grantors on the 1st day of November, 1889, sold and conveyed to Johnson N. Camden with the following mining rights and privileges.

The party of the second part and his assigns is to have the right of way through said reservation for a road, air course and drain way, necessary or convenient for the mining and removal of said coal and the coal under co-terminous and neighboring lands, together with the right to enter upon and under said land, and to mine, excavate and remove all of said coal and remove upon and under said land the coal from under adjacent, co-terminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described, and make all necessary structures, roads, ways, excavations, air shafts, drains, drainways and openings necessary and convenient for the mining and removal of said coal and the coal from co-terminous and neighboring lands to market.

The declaration further alleges that said coal and mining rights were, by various deeds, conveyed to the Fairmont Coal Company, and that it was on the..... day of....., 1902, the owner of said coal and mining rights and privileges; that the said farm or tract of land was owned in fee and used and occupied by the plaintiffs on the day and year last aforesaid, and for a long time prior thereto as a home and farm; that the defendant on the day and year last aforesaid, and prior thereto, mined and removed the coal under the said tract of land, as it had a right to do, leaving, however, large blocks or pillars of coal as a means of support to the overlying surface of said tract of land; that on the

.....day of....., 1902, the defendant, well knowing the premises, by its agents and servants wholly ignoring the right of the plaintiff in that behalf, did willfully and negligently, and without any compensation therefor, or from the damages arising therefrom, mined and removed all of the said blocks or pillars of coal left as aforesaid, and that by reason, of the mining or removal of said blocks or pillars of coal, and by reason of the failure of the defendant to provide in any way proper or sufficient support for the overlying surface of said land, the said land, or a large portion thereof, was caused to fall; that the strata of rock overlying said coal and forming a part of the said land were cracked, broken and rent, and that large bodies of it, with the overlying surface fell leaving the said surface with holes and sunken places of such great size and depth as to render it unsafe and of little value for grazing stock or cattle or other farming purposes; that fissures of great depth, and running at great length were made at different places on said land, some of which were near to the dwelling house of plaintiff, passing through that part of said land most valuable for cultivation, and all the water percolating said land above the said coal removed as aforesaid, and all the springs and other courses supplying said farm were diverted, sunken and wholly destroyed.

There is also a second count in the declaration, alleging that defendant through its agents, servants and employes entered said mine under the said premises and wrongfully and willfully, and without any compensation therefor, did quarry large quantities of valuable building stone and remove the same off of the said premises, which stone was of the value of $200.00.

The damages claimed in the conclusion of the declaration are $5,000.00.

The defendant has entered a general demurrer to the declaration and each count.

The questions arising upon this demurrer are the only ones now before the Court.

No defects in the second count have been suggested by counsel and none are observed by the Court, unless it be that it should be averred that the stone removed belonged to the plaintiff. It is possible that by a liberal construction this may be inferred from the general averment of ownership of the land (with the exceptions named) contained in the first part of the declaration. It was probably unnecessary to repeat this, in this count. The demurrer to the second count may therefore be overruled.

The serious, and in fact, only important question in this case arises upon consideration of the first count. No objections have been pointed out to the form of this count. The objection insisted upon by defendant goes to the right of action. If the defendant's contention be correct the facts stated in the first count do not constitute a cause of action, even if formally pleaded.

I may add, in passing upon this count, that the declaration should, in addition to the formal commencement and conclusion, contain four parts, to-wit:

FIRST, A statement of the interests and relative rights of the parties.

SECOND, The duties which the defendant owed the plaintiff.

THIRD, The breach of duty on the part of the defendant, And,

FOURTH, The damages which resulted to the plaintiff by reason of this breach of duty.

This declaration does contain a very full statement of the rights of the parties. It avers that the plaintiff owned the land, except the coal and mining rights and privileges

named; that this coal and mining rights belonged to defendant; that plaintiff was in possession, using and occupying the land as a home and a farm; that the defendant mined and removed coal under said land as it had a right to do.

The declaration does not, however, in specific terms, declare what are the duties as claimed by the plaintiff imposed upon the defendant in the premises. The pleader simply avers that the defendant mined and removed coal under the land, leaving, however, large blocks or pillars of coal as a means of support to the overlying surface, and then alleges that the defendant, by its agents and servants, wholly ignoring the rights of the plaintiff in that behalf did willfully and negligently, and without any compensation therefor, or for the damages arising therefrom, mine and remove all of the said blocks or pillars of coal, left as aforesaid, and that by reason of the mining and removal of said blocks or pillars of coal, and the failure of defendant to provide in any way proper or sufficient support for the overlying surface the land was caused to fall, etc. Now it will not be contended, I apprehend, that these blocks and pillars of coal did not belong to the defendant, nor that it did not have the right to remove them. All that can be claimed is that if all the coal be removed some sufficient support would have to be provided in its stead. At most, all that could be required of the defendant in this respect would be to furnish a sufficient support for the overlying surface. The declaration is somewhat confusing and uncertain on this point. But if I am correct in the views hereinafter stated this is immaterial.

The plaintiff claims damages in part for the reason that "all the water percolating the said land above said coal removed as aforesaid, and all the springs and other water sources supplying said farm were diverted, sunken and wholly destroyed." Under no circumstances could the

plaintiff recover anything on this account. The removal of all the coal would necessarily sever and destroy the subterranean water streams, and prevent a flow to the surface. The perfect support of the surface in place would not preserve these streams. If, however, this count be otherwise good, and contain matter sufficient to sustain the action, the demurrer being to the whole count, would have to be overruled. The rule of law is that "where there is a count in a declaration which contains matter which will sustain the action, and also matter upon which no recovery can be had, and there is a demurrer to the whole count, the demurrer must be overruled; but if the good and bad on the count are divisible, there should be a demurrer to such part of the count as sets up matter upon which there could be no legal recovery."

Newlon vs. Reitz et al, 31 W. Va. 493;
Robrcht vs. Marling, 29 W. Va. 765.

The averment that the strata of rock overlying said coal and forming a part of the said land was cracked, broken and rent, and that large bodies of it with the overlying surface fell, leaving said surface in the holes, and sunken places, etc., is clearly divisible from the allegation that the spring and the water sources were sunken and destroyed. But the demurrer is to the whole count and not to this special matter, and the Court must consider whether or not the count contains any matter which will sustain the action.

In investigating this subject the character of the transaction should be kept in mind. The plaintiff of his own will sold and conveyed this coal with the express privilege of removing *all of it.* The defendant owns the coal with express right to move all of it. The plaintiff knew when he sold the coal that its removal was contemplated, and consented thereto in language which admits of no doubtful

meaning. He also knew that when all the coal should be removed that the overlying surface would sink unless supported. He, by clear and unequivocal language granted a privilege which would necessarily injure him. Why did he grant this privilege? Was the contemplated injury to the surface a part of the consideration of the grant? or was there an implied contract that compensation would be made for the injury? The deed itself is silent on this subject. Which is the more reasonable theory? Why shall not the defendant have without additional compensation, what the plaintiff has sold and conveyed and agreed it shall have? There being no ambiguity in this contract why should the Court look beyond it for a meaning? Why shall it not be permitted to speak for itself?

A person who owns the entire estate may sell and convey any part of it. It may be divided horizontally, perpendicularly, or in any manner according to the will of the owner. It is a mere matter of contract. The plaintiff owning the entire estate had the unquestioned right to sell and convey this coal with necessary and convenient mining rights. He did this. Why is not the transaction closed? It certainly is unless there is an additional implied contract or the Courts shall extend and add burdens not included in the deed. It is insisted by the plaintiff that the owner of the coal must bear this additional burden because it proposes to remove the coal and that its removal will injure the overlying surface unless supported. Was not this as well understood before the deed was made as afterwards? The plaintiff parted with his title to the coal and granted the right to have it removed upon terms satisfactory to himself. He could easily have required the grantee to furnish support for the surface when the coal should be removed. He owned the natural support of the surface, and sold it and granted the right to remove it, and now asks that before this natural

support is removed some other must be promised by the purchaser. It is conceded that the defendant takes under its deed all the coal, and has the right to remove it, that is, it is the owner of all but it is said it cannot use it (for it is of no possible use to defendant without being removed) without providing some means by which the overlying surface will not be disturbed. On the other hand it is insisted by the defendant that when the plaintiff sold this coal, including the right of removal, that he must have known that its removal would injure the surface unless supported, and that as a man of ordinary prudence and business capacity he protected himself and received ample remuneration for this injury in the purchase price,—that the consideration paid included the value of the coal, and the injury which would be done to the residue of the estate by its removal. Of course the mere fact that a person is the vendee of another does not get him a license to wantonly injure his vendor. It is simply a question of whether the injury complained of was anticipated before the conveyance, and taken into consideration and compensated for in the consideration paid by the purchaser. When the contract is silent upon this point is there any reason why a contract for the sale of minerals should be construed by rules entirely different from the rules of construction applicable to other contracts. It is a rule, without any exception (unless the class of contracts under consideration constitute exceptions) that when a person sells a thing with the right to remove it, or the right to occupy and use it, that he is conclusively presumed, in the absence of a contract to the contrary, to have included in the consideration not only the value of the thing sold, but compensation for the inconvenience and injuries which will necessarily result by its removal or occupation. Many illustrations might be given, such as the sale of growing crops, fruit on the trees; wool

on the back of the sheep; trees standing in the forest. Many logs of timber are sold from the standing trees, with the right to cut and remove, and no one would think of asking compensation for the residue of the trees before removing the logs, although the removal of the logs would destroy the trees. In such case, evidently the person selling the logs would take this into consideration when fixing the price of the logs. A farmer may sell that part of his farm most useful to him in furnishing an outlet to the public road, making access to the highway inconvenient. He may sell that portion containing water and seriously lessen the value of the residue, but these things are all presumed to be taken into consideration when the sales are made. The building of a road through a piece of land may damage the part not taken. This is always considered when fixing the price of the right of way, whether by private sale or condemnation. Why should a different rule prevail when a contract is for the sale of mineral below the surface? None are suggested by counsel, except that the Courts of England have established a different rule, and many of the American Courts have followed these decisions. While these decisions do not have the force of law in this State, yet they are of such character as to deserve the careful consideration of the Courts. They are persuasive but are not conclusive arguments, especially should it be found that one simply leans on the other.

The English rule as tersely stated by Baron Parke in the case of Harris vs. Ryding, 5 M. & W. 60, in the following language, "I do not mean to say that all the coal does not belong to the defendants, but they cannot get it without leaving sufficient support."

The rule thus suggested, when carried to its ultimate and logical conclusion means that a sufficient support must

be left even if it takes all the coal. The Supreme Court of Pennsylvania has frankly stated the rule to be:

"Where there has been a horizontal division of land the owner of the subjacent estate, coal or mineral, owes to the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way effects the responsibility; what the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land." Noonan vs. Pardee, 200 Pa. State Rep. 474. The learned Judge in delivering the opinion of the Court in this case said, "of course the defendant has a right to all the coal under his lot, but he had no right to take any of it if thereby necessarily the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface." This is the English rule broadly and frankly stated, and the one which a large number of American Courts have rigidly followed without question.

So far as I have been able to ascertain the first American case announcing this rule was decided by the Supreme Court of Pennsylvania in 1871. Without giving any substantial reasons for the opinion the learned Judge says: "The English cases referred to and others which might be referred to emanate from great ability, and from a country in which mining, its consequences and effects are more practical, and the experience greater than in any other country of which we possess any knowledge. We think it safe, therefore, to follow its lead in this matter." Jones vs. Wagner, 66 Pa. State 429, 5 Am. Rep. 385. There are a number of other cases in Pennsylvania decided the same way.

The same rule has been adopted in Alabama. See Williams vs. Gibson, 84 Ala. 5 Am. State Rep. 368, decided in 1887.

In the case of Marvin vs. Brewster Iron Mining Company, decided in 1874, and reported in 55 N. Y. 538 and 14 Am. Rep. 322. The Supreme Court of that State recognized this rule. See also Byckman vs. Gillis, 57 N. Y. 68 and 15 Am. Rep. 464.

The Supreme Court of Indiana has adopted this rule in the case of Yanders vs. Wright, 66 Ind. 319, also 32 Am. Rep. 109, decided in 1879.

The same rule is adopted by the Supreme Court of Illinois. See case of Wilms vs. Jess, 94 Ill., 464, and 34 Am. Rep. 242, decided in 1880.

The Supreme Court of Iowa has not only approved this rule but has gone a step further and held that when one conveys land to another, reserving the right to remove the underlying coal if necessary to support the surface of the soil, he must leave pillars or ribs of coal, although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations. See Livingston vs. Moingona Coal Company, 49 Iowa 369; also 31 Am. Rep. 150 decided in 1873.

It must be conceded that plaintiff's contention is supported by many of the best American and English Courts. But it will be found upon careful examination of the decisions of the American Courts that they have been contented with following the dicta of the English Courts. The Pennsylvania Courts first adopted the English rule for the reason that the cases "emanate from great ability, and from a country in which mining, its consequences and effects are more practical and the experience greater than in any other country of which we possess any knowledge." And hence the Court declared "we think it safe to follow its lead." This was the first decision of this question in this country and it is still the leading case, referred to and followed by all the other American Courts; and yet no better or other

reason is given for it than that the Court thought it safe to follow the English cases. I refer to Jones vs. Wagner 66 Pa. State 429. So that while we find many American Courts following the English decisions we gain nothing from the American cases, and must look to the English cases alone for the principles upon which the decisions rest.

The reason given by the English Courts for the rule under consideration, is that there are two separate estates, one belonging to the owner of the mineral and the other to the owner of the surface; that each has the right to use his own—the owner of the surface to occupy the surface and the owner of the minerals to mine them, but each must so use his property as not to interfere with the other, in accordance with the well recognized maxim of the law. "Enjoy your own property in such a manner as not to injure that of another person." Truly this is a just and equitable maxim. It is the Golden Rule of the law. But no one should be permitted to use it as a cloak to cover wrong. Certainly the person who owns the entire estate may sell a part of it, and also a privilege to be exercised in connection with the part sold, which will injure the part retained by him. It would be manifestly unjust for the person who has made a contract of this kind, and received the compensation for the injury, to be permitted to invoke this righteous maxim to aid him in committing a fraud. I understand this maxim can only be properly applied to "restrict the enjoyment of property, and to regulate in some measure the conduct of individuals by enforcing compensation for injuries *wrongfully occasioned* by a violation of the principles which it involves, a principle which is obviously based in justice, and essential to the peace, order and well being of the community." Brooms Legal Maxims, 289. I do not understand that it applies to injuries done to property by authority of the owner for a compensation. The compensation for the

injury is a proper matter of contract between the parties, and there is no reason why the injured party may not receive satisfaction by contract as well as by the verdict of a jury. In order to avoid the force of this reasoning it has been held that in such conveyances all the estate is not granted with the minerals—that prima facie enough is reserved by implacation for support of the overlying surface. Lord Chief Justice Campbell in the case of Humphries vs. Bragden, 12 Q. B. 739 says: "There is a prima facie influence at common law upon every demise of minerals or other subjacent strata when the surface is retained by the lessor that the lessor is demising in such manner as is consistent with the retention by himself of his own right of support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *moda et forma*, and with the natural support which it possessed before the demise" 32 Am. Rep. 112. Baron Parke admits that the title to minerals passes by the deed, but says the grantee cannot take them without providing support for the surface, but Chief Justice Campbell lays down the rule that presumption is, in the absence of express words waiving or qualifying the right that the surface must be protected with the natural support which it possessed before the demise. Which means I take it that enough of the minerals are reserved for this purpose. I cannot assent to this proposition. This rule taken in connection with the other one propounded by the same Court, that sufficient of the minerals must be left, no matter how much, to support the surface, involves the absurd proposition that a person who owns the entire estate may convey without limitation or qualification all the coal, with the right to remove it, and yet the deed contain the presumption that a portion of the coal is reserved, and further, that the coal reserved may amount to the whole of the estate granted

that the purchaser, in fact takes nothing. It seems to me that this is *reductio ad absurdum.* Why not assume, at least prima facie, that the deed is correct; that it means just what it says when there is no ambiguity? When a deed on its face by plain and apt words conveys all the coal, why should the Courts say there is an implied reservation of a part or perhaps of all of it, and that less than the whole or in some cases nothing, is conveyed? The owner of property about to part with the title is at liberty to prescribe the terms and conditions on which he will do it. The intention of the parties is presumed to be expressed by the language of the deed itself. If no reservation or exceptions are found in the deed none should be presumed. The deed as the witness to the contract between the parties should speak the truth, the whole truth and nothing but the truth.

The rule for the construction of deeds prescribed by our statute is:—

"Every such deed conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest, whatever, both at law and in equity of the grantor in such lands." Code Ch. 72, Sec. 2.

Again, some of the Courts uphold the rule on the principles applied in the cases prohibiting one owner of land from making an excavation so near the adjoining lands of another that the soil of the latter breaks away. This illustration is not a happy one. Ordinarily, in the cases where lateral support is required there are no contractual relations between the parties. Even when they sustain the relation of vendor and vendee toward each other the excavations are not contemplated by the nature of the transaction. But in the sale of coal the removal is not only contemplated but expressly authorized. Lord Campbell in delivering the opinion in the case of Humphries vs. Bragden 12 Q. B. 739

cites as authority supporting his opinion, the case when a person purchases one story of a building containing two or more stories. He says:—

"Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound merely by the nature and condition of his property without any servitude, not only to bear the weight of the upper story but to repair his own property that it may be capable of bearing that weight. The proprietor of the ground story is obliged to uphold for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." 32 Am. Rep. 112. The conclusion reached by the learned Chief Justice is erroneous because his premises are wrong. He assumes that the cases are similar. A moment's reflection will convince anyone that they are dissimilar in a very material point. The story of the building, whether the lower or top one, is sold and bought to be used in place. This is apparent from the very nature of transaction; but in the case of the sale of coal the opposite is true. It cannot be used in place. In the case at bar nothing is left to presumptions. The deed expressly grants the right to remove it.

It is conceded that the grantor might waive the right to support of the surface, and where that is done there can be no recovery for injuries caused by the subsidence of the soil. It is insisted by the defendant that the language used in the deed in controversy is equivalent to a waiver. It is true that in this deed there is not only a grant of the coal but also an express grant of the right to remove *"all of it."* It may be that this grant of the right of removal adds nothing to the legal effect of the deed except to make the general grant more emphatic. Taking the entire granting clause of the deed together there can be no doubt as to intention

of the parties. I rest the case on the fact that plaintiff, by his deed, conveyed the coal with the right to remove all of it. There is no limitation to or qualification of the estate granted, nor is there anything in the deed to indicate an intention to limit or restrict the right to remove the coal. Then, the plaintiff was the owner of the entire estate, and when parting with the title to the whole or any part of it could do so on terms and conditions to be agreed to by him. He was fully aware of the injury that might naturally and reasonably be expected to result from the removal of the coal, and yet he expressly authorized its removal. Under these circumstances it is proper to assume that the price paid for the coal and the mining rights granted, was fixed with reference to the nature, extent and effect of the rights conveyed. There is no ambiguity in the terms of the grant, and there is no reason to believe that the grantee did not fully understand them, or what was the effect of the deed, deliberately made by him.

It may be that it was an improvident contract; but Courts cannot make contracts for people; they can only construe the contract made by the parties. I cannot construe this contract to mean that the parties intended that the plaintiff should sell his coal, receive the pay for it, and keep both the coal and the money. This would certainly be a perversion of the homely old proverb that you "cannot eat your cake and keep it." Nor can I reach the conclusion by any fair construction of the language employed by parties in the deed that any additional burden was to be placed on the grantee before enjoying his property than these named in the deed. This would be inserting in the deed new conditions.

I am clearly of opinion that the Courts hereinbefore referred to have wholly disregarded the well established rules of construction applied in construing all other con-

tracts. It is a rule, as I understand the law of universal application, that where there is no ambiguity in the language of a deed it should be construed according to its legal effect to be gathered from its face. 5 Gratt. 141.

But if these cases are to be followed a different rule is to prevail in construing deeds conveying minerals. We must according to these decisions, presume that a part of the thing conveyed was intended to be reserved, notwithstanding the conveyance is without qualification or limitation, or any expressions in any part of the deed indicating that the parties intended anything but an absolute grant.

I wish to be clearly understood, and hence at the risk of becoming tiresome by unnecessary repetitions I will add that I do not mean to intimate that the person who owns the entire estate and sells the subjacent strata of any kind should give away the surface or waive damages thereto without compensation. What I mean is that all such questions should be settled at the time these strata are sold, and that Courts should presume they were so settled unless a contrary intention appears on the face of the deed. The removal of substrata is a matter of too much importance, and effects too largely the residue of the estate, not to enter into the contract or to be left to doubtful and uncertain implications of law. Of course the rule of law which applies to coal must apply to fire clay, potters' clay, iron ore and all subjacent minerals. The thing sold and to be removed may be of very small value as compared with the overlying surface, and as a consequence the owner would want to sell only so much as could be removed or taken away without disturbing the surface, on the other hand, the thing sold may be of so much more value than the surface that the owner would be willing to sell and authorize the removal of all without reference to the soil. He might not wish

to retain coal which he could sell at $100 per acre to support surface worth $5.00 per acre.

Many examples may be found; coal removed from the same opening, and when the coal is of the same value, yet there may be immense difference in the value of the overlying surface. Then, again, in many places are found several veins of coal overlying each other; when the owner of all of them sells the lower vein and retains the others he is interested not only in protecting the soil but the intervening strata as well. Many other illustrations might be given but these are sufficient to illustrate my idea and to show that in all sales of minerals the question of injury to the lands not conveyed is of so much importance that Courts should not assume that it was not considered and made part of the consideration of the deed. In mining coal perhaps from 35 to 50 per cent of the entire vein would have to be left in the land by way of ribs and pillars, unused to form surface support. This would depend to some extent upon the depth of the coal below the surface and the nature and condition of the intervening rocks if any. These pillars and ribs would be of no possible use to anyone except to the owner of the overlying surface. Now whether all this coal is to be bought and removed, or only a part of it, and the residue to be kept by the owner for the benefit of his other estate, are proper subjects of contract, and the contract must be expressed in the deed. When the deed shows clearly on its face that all the coal was sold, and especially where there is a clause giving the right to remove all of it, I cannot think the Courts have any right to say that the deed does not *prima facie* mean what it says. This would be to construe out of the deed, after it was made and delivered from 35 to 50 per cent. of what clearly passes by its express terms. For it is a matter of common information, known to all who have paid any attention to mining that in coal

mines the coal will have to remain in place as a support, or the surface be permitted to subside. Permanent artificial support would cost more than the coal is worth in most cases. So it is a question of leaving something like one-half the coal in the mine or removing all and permitting the overlying surface to adjust itself to a new bed. And this, I again repeat, should be left for the parties to determine by their contract. If the owner of the coal wishes to keep half of it as a support for the surface, he has a perfect right to do so, and if he wishes to sell all and permit all to be removed he may also do that. When he has made his contract in accordance with his own will and reduced it to writing the Courts may declare the legal effect of the writing but cannot change it.

Then there is a theory endorsed by many persons of large experience that it is better to remove all the coal and permit the overlying surface to fall and form a new union the subterranean streams are often reunited and at any rate the land lying between the mine and the surface is protected from drainage—that opening made by the removal of the coal being closed, the drainage is to some extent prevented and the moisture preserved to the soil; and hence, many deeds require all the coal including the pillars and ribs to be removed. Of course by doing this, even in the most skillful manner, the surface will occasionally be broken, but it will not be contended I suppose that in such cases the miner would be liable. The owner could scarcely be given damages, for the unavoidable result of a thing which he required to be done. But what is the difference in this regard when the thing is required to be done, and when it is expressly authorized to be done? It seems to me that such difference would be imaginary rather than substantial.

I am not aware that the principal question raised in

the case has even been decided by any of the Courts of this State. No more important question has ever been presented to any of the Courts of the State for decision. It effects very materially the greatest element of wealth in the State, and to some extent the value of many thousands of acres of land.

This case will no doubt be finally passed upon by the Supreme Court of Appeals, and thus become the leading case on the subject, and perhaps settle the law for all time in this State. It is therefore of the utmost importance that the question involved should be determined upon correct principles.

It would be much easier for me to do as other American Courts have done and follow the English decision without question or examination of the principles upon which they are founded, but I am so clearly of opinion that these cases have been wrongly decided that I cannot follow them.

The demurrer to the first Court in the declaration will have to be sustained, as it seeks to recover damages from the defendant for having done what the deed upon which the action is based, clearly and unequivocally authorized the defendant to do.

It is from the foregoing opinion and judgment sustaining the demurrer that the writ of error was taken by the plaintiff to this Court, and the question now presented for determination by this Court is whether or not Judge Mason's ruling in sustaining the demurrer should be affirmed by this Court.

It is natural for counsel who have cases in the Supreme Court to believe that the questions and principles involved are, generally speaking, extremely important. This is almost always true, so far as the litigants in the particular case are concerned, but there are only a limited num-

ber of cases brought to this Court in which the Court is called upon to determine a principle of law that affects the people of the whole State, whether they be parties litigant or not. But we feel that this is just such a case, and that there are more and larger interests involved in the determination of the question here presented than in any case that has ever been brought to the attention of this Court. I feel it incumbent upon me to impress upon this Court the fact that no more important question has ever been presented to a Court, either State or Federal, in the State of West Virginia than that which is now before you in this case for decision. The reason I make this statement is, that perhaps three-fourths of all the coal ownership in the State of West Virginia are held under deeds similar to the one now before you for construction, and while this particular case affects only sixty-eight acres of coal, yet the principle involved will determine the respective rights and duties that govern the ownership of many million acres of coal in the State of West Virginia. If the plaintiff should prevail in his contention, it would mean a complete destruction of at least one-third of the coal held under deeds similar to the one now under consideration, and this one-third would amount in dollars and cents to at least two hundred and fifty dollars per acre. The Court can readily see that the plaintiff's success in his contention means a destruction of property that will amount in the aggregate to billions of dollars of money in the State of West Virginia, and it would mean loss to the Fairmont Coal Company alone of over seven millions of dollars. On the other hand, if the defendant is right and Judge Mason's opinion and judgment is correct, it means no more than giving a proper and legal effect to the deeds and written contracts of the parties entering into them, and adhering to the well established,

usual and ordinary canons of construction of written instruments.

In passing upon this question we should take into consideration the business conditions of the past, the existing conditions of the present and the growth of population and business in the State of West Virginia for the future. We should not lose sight of those natural elements of wealth that are so characteristic of the State and upon which its present business largely rests, and upon which its future growth depends; and upon the methods and processes by which these natural elements are to be utilized. Nature has given to the people of West Virginia three great sources of wealth in the natural state. First, timber; second, the surface of the land itself; third, the coal, oil, gas and minerals under the surface.

For a great many years the principle source of traffic and business in the State has been its timber and the product of the lumber mills, but the time has now come when the forests have mainly disappeared and there remains not a great deal of standing timber that is capable of yielding a profitable return to the business man who would undertake to cut, haul and manufacture it into lumber, and the people of the State must look to some other source for their business employments.

A traveler going from east to west through the State of West Virginia, starting at the Pennsylvania line in the County of Monongalia and traveling to the County of Mercer and to the line of the State of Virginia, would pass through a continuous, unbroken and persistent chain of mountains and hills. With the exception of the level lands adjacent to the larger water courses in the State, all of its surface is hilly and mountainous. The farms that cover the hills and mountains cannot produce farm products to compete in the markets with the farm products of the west-

ern and middle states. The West Virginia farmer can make a living by hard work on his mountain farm, but he cannot make money. In those counties where there is more or less blue grass the grazing is sometimes good, but even in stock raising he is at a very great disadvantage when his stock comes in competition with the herds from the western states. A fair value for farm lands in the mountains of West Virginia would be, perhaps, fifteen dollars an acre. In the better blue grass sections, where the land is adapted for grazing, the average price for farm lands, including improvements, would be about fifty dollars an acre. If we look to the surface of the land of the State alone to afford a living to the citizens and to give to them and their children employment, then we can never hope to be anything more than an agricultural people, laboring under difficulties and disadvantages to such an extent that we can never grow and prosper; can never extend the business of agriculture, because nature has made it impossible, and the best we can hope for is to have the mountains produce barely enough to live upon. Under the most favorable circumstances, in the best seasons, the lot of the man who owns a West Virginia mountain farm is anything but an easy one, and if our efforts should be confined to farming and all other business of the State made subordinate to that one industry, then we have reached the maximum of our growth.

Nature never intended our wealth should consist of the surface of the land, or what the surface would produce, she never intended that the business of West Virginia should be an agricultural one, for she has placed beneath the surface elements of wealth, which, if properly utilized will make this State the richest in the union. Already upon the oil and gas found in the State has grown an enormous business, employing thousands of men, and in localities where found have produced great wealth.

But these are insignificant compared to the great natural element of coal that is deposited in the hills and mountains of West Virginia. Having a much larger coal acreage than any other State, its natural resources and wealth are consequently very much greater, but unless this coal can be utilized and taken out in such a way as to make it profitable it will not add to the wealth of the people. It must be worked and developed, mined and carried to market, in order to bring to the people of the State the best results. Only within the last few years has there been much effort made toward developing the coal industry of the State.

We may say that the coal business today in this State is only beginning, really only in its inception, and if the coal production should reach its normal capacity there would be a product sufficient to supply the demands of the whole world. And when this time comes, as I believe it will come in the near future, every State in the union, every country in the world will be paying tribute to the West Virginia coal fields.

Coal is no longer a luxury. It has reached that point in the course of the world's industrial growth where it has become as much of a necessity as food or clothing. The human family cannot live without it; all their industries are dependent upon it. With this inexhaustible supply of coal that is now locked up in our mountains and with this universal demand for it, it easily becomes a subject that is the chief matter of concern to the people of the State, and if we would cultivate the talents which the Creator has given us, if we would fill this demand from the supply which we possess, then everything should be done by citizen, legislator and the Court that would foster and promote the growth of the coal industry, for upon the right control, and best business management of this industry, depends our supremacy as a people in the future, and I

shall take it for granted that every other interest in this State that may be in opposition to the growth of coal production should be subordinated and made subservient to that which means wealth and prosperity to all the people of the State. In other words, the interests of the people, the development of the State, its progress and its business depends upon the free and untrammeled right of the people to develop, mine and market the coals underlying the surface of the hills of West Virginia.

This demurrer involves two questions—one of law, that has been evolved from the law of England, and followed by some of the Courts of the States; and a more important question of public policy, and a just and equitable law based upon that policy.

(1) The Courts of England hold that the owner of the surface is entitled to have that surface supported by the person removing the coal under that surface, unless a contrary intention appears from the deed severing the coal from the balance of the estate. The conditions existing at the time that principle was declared are so different from the conditions that confront us now in the twentieth century that it is expedient to call the Court's especial attention to it.

In the earlier history of England coal as a fuel was quite unknown, and became a commodity about the time of the Norman Conquest. When the Lords and Barons of England owned all the land and held it under the Feudal system, when to be considered as a man of consequence it was necessary to be a landed proprietor, they had their retainers, men at arms and serfs, who paid court to the lord of the manor as the lord did to the King. The great men of the kingdom were the landed proprietors. They constituted the support of the crown, they were the aristocrats, they were the real rulers of England; they consti-

tuted the Courts, and dictated the laws. No other race of people is so desirous of becoming owners of land—"Broad acres are ever dear to the English heart." In their earlier development they desired the surface of the land; they built on it their castles, and held their hunts and tournaments; they fought the Scotch and Irish for it, they fought each other for it, and they are still fighting the world to gratify the same longing. They cared nothing for the coal, but loved with a patriotic fervor their fields and forests. Their tenants used peat as a fuel when wood was scarce. The tenants finally discovered that coal would burn, and would make a good substitute for peat and wood. Their smithing was done with charcoal. The first mining was done by stripping the soil from the top of the coal bed, the surface was removed—stripped off—and the coal was shoveled out of its bed. Ultimately this involved the disturbance of too much surface. The lord—the proprietor—objected. Then his tenants must burrow into the coal bed under the surface, which they did. In order to do this legally they procured from the lord a license to remove the coal; they agreed to pay a license fee for this privilege. After a while this fee was called a royalty. This license was an incorporeal hereditament—carried with it no right in the property and vested in the grantee no estate. In prosecuting the mining operations, the tenants knew nothing about propping up or supporting the surface, and as a consequence when the coal was all taken out the surface dropped. Some of these coal deposits being 40 feet in thickness the drop was considerable and disturbed the even surface of the lord's lawn and threatened the destruction of his castle. The lord sued his tenant for damages. The Courts being part and parcel of the landed proprietors, having the same national instinct for land and considering it the dominant interest of the realm, and the tenants right being a mere license,

a right of user, and the coal interest being practically unknown and its importance undreamed of, the Courts held that the tenant miner must support the surface or respond in damages.

As soon as coal mining developed into a business, and coal became an article of commerce the *mining leases all had clauses in them making the lessee responsible for all damages occasioned to the surface.* These are some of the considerations that actuated the English Courts to promulgate the doctrine of surface support.

The first case that arose in the United States, involving the question of surface support, was in 1871, in the case of Jones vs. Wagner, in the Pennsylvania Supreme Court, 66 Pa. 434. The only discussion of this subject at that time was to be found in the English cases. There was no legislation upon the subject, nor could there be, for legislatures could neither prohibit men from contracting, nor destroy the obligations of contracts. This extraordinary power could only be exercised by Courts of last resort. The Pennsylvania Supreme Court found itself in a predicament that is, without a precedent in its own country, and without a sufficient knowledge of the question involved to establish one for itself. It was hopelessly at sea. It forgot all about the principles governing the construction of written instruments, and in its confusion here is what it says—in its first case—Jones vs. Wagner, Supra:

> "The English cases emanate from great ability, * * * * and a country where the mining experience is greater than it is in other countries, and for that reason we think it safe to follow its lead in this matter."

It is extremely fortunate that the Court gave its reasons for its decisions, for upon these reasons is based the whole doctrine of subjacent support in every Court of the

United States that has had the question under consideration. Pennsylvania looked solely to England for guidance, and the other States have looked solely to Pennsylvania, and none of the Courts have been able to give any better or different reasons for their positions than the Pennsylvania Supreme Court in Jones vs. Wagner. English Courts created the doctrine, and the American Courts have followed in their paths without question.

Without taking into consideration all the changed conditions that prevailed in Pennsylvania at that time, and apparently knowing nothing whatever of the history of the coal mining industry of England, the Pennsylvania Courts have followed the English decisions simply for the mere love of precedent. *The reasons that gave life to the English law did not and could not exist in the State of Pennsylvania, which has formed the basis of the doctrine for other American States.*

"The reason of the law is the life of the law."

Both the English and the Pennsylvania cases, however, base their ruling upon leases where they claim that it was the *intention of the parties* that the mine operator should provide surface support. But they likewise agreed that if the contrary intention appears in the deed or lease under which the mining operation is carried on, then the owner of the coal may remove it without providing for a support to the surface, and also without subjecting himself to damages by reason of any injury that might result to the surface. See title "Lateral and Subjacent Support," 18 American Encyclopedia of Law, 2nd Edition:

> "The man who grants the minerals and reserves the surface is entitled to make any bargain he likes; both parties are just as much at liberty to

make a bargain with reference to coals and minerals as to make a bargain with reference to anything else."

Smith vs. Darby, 7 Q. B., 716;
Scranton vs. Phillips, 13 Pa., 22.

This was exactly what the plaintiff did in this case. He expressly granted to the defendant or its predecessor in title, "The right to enter upon and under said land and to *mine, excavate and remove all of said coal.*" Now if the contracting parties had intended that a part of the coal should not be removed, they certainly would not have stipulated and agreed that all of it should be removed.

There is no reason why the Court should not construe this deed under the same rule of construction that is applied to every other deed and written instrument. It is not necessary to cite authorities to the effect that the intention of the parties is the guiding star to all construction of written instruments, and this deed is so plain and the language used in it so simple that there ought not to be a difference of opinion in the minds of unbiased persons as to what the parties to it intended; that the grantor, the plaintiff in this case, intended to sell *all* of his coal and have all of it removed by the vendee I think does not admit of a doubt, *for he did make a reservation of three acres,* which was not to be removed, and only certain rights of ingress and egress on this reservation were conveyed or intended to be conveyed. The language used in the deed is as follows:

"The party of the second part and his assigns is to have the right of way through said reservation for a road, air-course and tram-way necessary or convenient for the mining and removal of said coal and the coal under co-terminous and neighboring lands."

If the language used in this reservation, together with the rights conferred, show anything, they show that the grantor did not intend to allow the coal contained in the reservation to be removed, except so far as was necessary to have passages for air and drainage through the same. The object of all of which, of course, was to have the surface overlying this reservation to be held and kept intact, so that the mining and removal of the coal would not disturb the surface and impair the buildings situate thereon.

If this Court follows the general doctrine relating to the construction of contracts, and that is, that from the face of those contracts the intention of the parties as herein expressed must govern, then there can be no question but that this Court is compelled to hold from the language used in the deed of conveyance itself, fortified by the specific reservation of three acres, that this defendant has the right to mine and remove all the coal under the surface of the land described in the declaration. To hold otherwise would be to cripple the great coal mining industry of the State of West Virginia. This being the first case that has arisen wherein this particular question is involved, the Court should be guided by the contract of the parties themselves, and that contract should be construed with reference to present and existing conditions rather than to go back centuries and follow the English precedents, as the Pennsylvania Courts have done.

It would be so against public policy to require in the absence of the contract specifically providing for it pillars of coal to be left in the mine sufficient to support the surface that no Court in this State would be justified in establishing so dangerous a doctrine. The Court will take cognizance of the fact that it requires one-third of the coal on an average to remain in pillars to properly support the surface from sinking or breaking, and this would mean that

in all the coal area in the State of West Virginia that one-third of it must be left untouched and unmined. If we calculate the value of the coal that is left and compare it with the value of the surface, we can readily see what a great hardship and what a great detriment it would be to the owner of the coal to require him to sacrifice a property that was so much more valuable than that of the surface. There is about twelve hundred tons to each foot of thickness of coal to the acre. Taking the average seam of coal to be seven feet, that would mean eighty-four hundred tons of coal to the acre, and at ten cents a ton royalty—and that is the sum that the coal owner obtains for it on royalty—it would amount to eight hundred and forty dollars. If, then, one-third of this value is to be left in the ground untouched, it would require property of the value of two hundred and eighty dollars to be wasted in order to preserve from sinking or cracking, property that is worth from ten to fifty dollars. Is it good public policy to sacrifice two hundred and eighty dollars of one man's property in order to save ten to fifty dollars of another's property? The breaking of the surface or the sinking of the land does not mean that it is totally destroyed, does not mean that it is wasted or rendered useless, but at most only results in temporary loss and temporary inconvenience. The land is just as good after it has settled six or seven feet lower, and it will produce just as well, the other conditions being present, as if it remained that much higher. The only cause of complaint would be the land cracking and creating fissures in the surface, which would render that part of it useless for the time being, and would possibly cause a temporary diversion of water. These breaks or fissures cannot be very wide in the nature of things, and in the course of a very short time would inevitably fill up and be as solid and compact as it was before any break or fissure occurred

and before any coal was mined and removed. It would only be a very short time after the breaking and sinking had occurred until the surface of the land would be the same as before, and equally as valuable, and in the language of counsel for the plaintiff in error,

> "The golden tinted sunrise would still guild with beauty the hills of West Virginia,
> The gentle breezes would still sweep the fields and upland with the ripening grain.
> Springs and streams would still bubble from the hillside, gently replenished by summer showers;
>
> Man would still be living upon the surface of the land,
> He would still be looking to it for sustenance and pleasure,
> He would still await the seasons for his sowings and his reapings,
> And he would still welcome the raindrops to moisten and create vegetation, and the sunbeam
> To quicken the plants and flowers which spring forth from the soil."

And, I might add, that vegetation would be just as luxuriant, and the beauty and fertility of the soil would in no wise be impaired. On the other hand, all the coal necessary to leave in the mine to sustain the surface in its original condition would be a total loss to the owner. The personal loss to the owner, great as it would be however, would be but small compared to the loss which the laboring man and the manufacturer and capitalist engaged in the production of coal, and coal consuming industries would sustain.

The principal value of the State of West Virginia being coal property, the principal business of the State at present as well as the future, being the coal business, it

would be a most vicious ruling of the Court that would establish a doctrine requiring a third of the coal values of the State to be lost and sacrificed. Especially would that be so, when we take into consideration the rough, uneven and mountainous character of the overhanging surface. The coal required to be kept in the mine for pillars or supports, if it can be taken out, will afford employment for labor and capital, and the additional value thus created by the sale of the coal itself, a value arising solely upon royalties, is worth five or six times more than the surface.

Certainly in view of the fact that the best public policy requiring the freest and most untrammeled right to mine and remove all the coal should not be overturned and should not be defeated, especially in the face of a contract between the parties themselves expressly providing that all the coal is to be taken out. We do not live in a day or in a time when one man's property is more sacred than another's, when the Courts have a tendency to exalt one class of citizens over another. We do not live in a day of lords and barons and villiens and serfs; we do not hold our property under feudal system. The coal under a tract of land is as much susceptible of conveyance, sale, traffic and barter as the surface of that tract of land. We live at a time when all property is supposed to be equally sacred and all men have equal rights before the law, whether they are miners or owners of coal, and to say that our 20th century civilization and the business and progress that is incident to it should be held down to and bound by the old feudal notions of ancient England is little less than the height of absurdity. We are confronted with the statement that there are precedents from the great State of Pennsylvania and other States of the union that would be a guide to this Court in reaching its conclusion in this case, to which we reply that

a *precedent which is wrong and vicious ought never to be followed.*

So far as the rules of property and the laws of contract relating to real estate are concerned, the State of West Virginia is as much a sovereign as the British Empire, and while we have great respect for the laws, the Judges and the Courts of that kingdom, they are not authority in this country, and are only suasive when they are based upon right reason and are consistent with the laws and institutions of our own country. The doctrine of *stare decisis* has been and is applied only to decisions of Courts existing under the same sovereignty, of which the Court having under consideration that doctrine is part and parcel. There is no rule of law requiring this Court to follow the decisions of the Courts of any other country or any other State in the union. This doctrine of *stare decisis*, so far as this Court is concerned, applies only to decisions that have been rendered by this Court in former times, and not to decisions rendered by other Courts. True, the decisions of other Courts in other States are to be treated with respect, but never to be followed unless their conclusions are correct.

Following are some of the decisions and expressions of the Courts as to the duty of following the trail of other Courts:

> "Hasty or crude decisions should be examined without fear and overruled without reluctance."
>
> Ramsey vs. N. Y. &c. Ry. Co., 133 N. Y. 79.

> "A Court should always rely upon a substantial and fundamental principle rather than upon an ill considered precedent."
>
> Springer vs. Shavender, 118 N. C. 33;
> Evansville vs. Senhenn, 151 Ind. 42.

> "A decision should not be adhered to where it would be fraught with far greater injustice than could possibly arise from overruling it."
>
> Frink vs. Darst, 14 Ill. 304.

This Court has not hesitated to overrule its own decisions, limiting and modifying them, whenever they were not in accord with right principles. Judge Brannon, in Simpkins vs. White, at page 129 of 43 W. Va. Reports, says speaking of the rule of *stare decisis*:

> "I yield to no one in respect to this rule conducive to stability and certainty of principles of law, but where it works so as to be illogical and unreasonable, it ought not to be followed. Where it applies to rights of property, it has stronger claim for observance than in cases of mere practice, as in this case. I would make this difference."

(In the case at bar the Court is called upon for the first time to make a ruling that will effect property rights hereafter, as this is the first time that this particular question has been presented to this Court.)

Judge Brannon quotes with approval from New York Supreme Court, as follows:

> "But the doctrine of *stare decisis*, like almost every legal rule, is not without exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of Courts to re-examine the question. Chancellor Kent, commenting on the rule of *stare decisis*, said that more than one thousand cases could then be pointed out, in the English and American reports, which had been overruled, doubt-

ed, or limited. He added that it is probable that the records of many of the Courts of this country are replete with hasty, crude decisions, and such cases ought to be examined without fear, and revised, without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.

While the maxim of *stare decisis* is strictly applied where titles to real estate have been acquired or commercial usages have been established under judicial decisions, yet where a decision contravenes, misunderstands or misapplies the law, and a reversal will not disturb property rights or commercial usages, such a reversal becomes proper and necessary."

Truxton vs. Fait & Slagle Co. (1 Pennewill (Del.) 483.)

In this case, which is reported in 73 Am. St. Reports, the Court says, at page 97,

"But where a decision contravenes a plain principle of law, or where, in such decision, the law has been misunderstood or misapplied and a reversal will not disturb property rights already acquired or make innovations on established commercial usages, it may then become the duty of the judges to reverse an erroneous decision of the same Court. In the case of McFarland vs. Pico, 8 Cal. 631, the Court says: 'We would not disregard a decision of this Court, deliberately made, unless satisfied that it was clearly erroneous. But the highest regard for the doctrine of stare decisis does not require its observance when a plain rule of law has been violated.' In the case of Paul vs. Davis, 100 Ind. 428, Justice Elliott, in delivering the opinion of the Court, uses this language: 'Consistency purchased by adherence to decisions at the sacrifice of sound principle is dearly bought. But we deem it unnecessary to further pursue this discussion, for we know quite

well that there is not a Court in England or America that has not corrected erroneous departures from the principles of justice by overthrowing previous decisions.' And later on the same judge adds: 'Much as we respect the principle of stare decisis, we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions, we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where there is none.'"

It will be noted that all of the foregoing expressions and judgments relating to decisions rendered by the same Court had these decisions under consideration in later cases. It will be kept in mind that we are not asking this Court to overturn or overrule one of its former decisions, but request of it that it do not follow the decisions of other Courts of other States and countries.

There is quite an extensive note to the last named case in 73 Am. St. Reports. Beginning at page 98, the editor says, at page 101, under the title of

PERPETUATION OF LEGAL ERROR.

"If judges were all able, conscientious and infallible; if judicial decisions were never made except upon mature deliberation, and always based upon a perfect view of the legal principles revelant to the question in hand, and if changing circumstances and conditions did not so often render necessary the abandonment of legal principles which were quite unexceptional when enunciated, the maxim stare decisis would admit of few exceptions. But the strong respect for precedent which is ingrained in our legal system is a reasonable

respect which balks at the perpetuation of error." Many cases cited.

At page 102, the editor in the same note, says:

> "The rule should be adhered to unless it appears that the evil resulting from the principle established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications upon the subject. (Cases cited.) If a decision of a Court is radically unsound, and subserves no useful purpose, but, on the contrary, establishes a hardship which is not within the manifest contemplation of the law, and, moreover, if no injurious results will be likely to follow a reversal, a plain case is afforded for a refusal to adhere to the doctrine of stare decisis. (Cases cited.) It is the manifest policy of our Courts to hold the doctrine of stare decisis subordinate to legal reason and justice, and to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error." (Cases cited.)

I have referred to the foregoing decisions for the purpose of showing to the Court that it is always better to be right than to be consistent, especially where this consistency results in perpetuating error and working injustice.

> "The great judge is the one who has ability to know the expanding wants of the community over which he presides, and has the courage to establish rulings that will promote their interest."

This deed of conveyance as set out in the plaintiff's declaration gives to the grantee and his assigns the express power and authority to mine and remove *all* of the coal under the lands described.

If this language defining the rights of the grantee is to be construed according to those well known rules that

have been laid down by the Courts of Virginia and West Virginia from time immemorable, then there should be no question as to the rights of the defendant to remove all of the coal, according to the letter as well as the intent of the parties to the deed.

The following citations will suffice to show how instruments of this kind should be construed:

CONSTRUCTION OF DEEDS.

"Words are to be constructed most strongly against the grantor and most favorably to the grantee,"

2 Minor's Inst., p. 996- 1066-4 h.
Carrington vs. Goddin, 13 Gratt. 587.
Allemong vs. Gray's Admr. 92 Va. 216.

"The deed should be so construed as to give effect to the *true intention of the parties,* as expressed in *the deed,* considered in all its parts, and *construing the language* according to *its common* and *usual acceptation.*"

Legario vs. Dozier, 91 Va. 492.

"The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same."

Gibney vs. Fitzsimmons, 45 W. Va. 334.
Hurst vs. Hurst, 7 W. Va. 339.
McDougal vs. Musgrave, 46 W. Va. 509.

"A deed should be construed according to its legal effect to be gathered from its face."

Palsey vs. English, 5th Gratt. 141.

"Where there is no ambiguity in a written

contract, oral evidence is not admissible to explain it, *as it speaks for itself.*"

Long vs. Perine, 41 W. Va. 314.

WORDS.

"Words and expressions of common use are to be taken in their natural, plain, obvious and ordinary signification, unless a contrary intention clearly appears from the context of the contract."

Snodgrass vs. Wolf, 11 W. Va. 158.

INTENT OF PARTIES.

"In the construction of contracts all the provisions thereof shall be taken into consideration and reconciled, if possible, so that the true intent of the parties to the contract may be ascertained."

Barber vs. F. & M. Ins. Co., 16 W. Va. 658, 3rd Syll.

INTENT OF PARTIES TO GOVERN.

"In order to ascertain the intention of the parties, Courts will look to surrounding circumstances, the situation of the parties, the subject matter of the contract and acts done under it."

Heatherly vs. Bank, 31 W. Va., 76 and cases cited p. 77.
Scaggs vs. Hill, 37 W. Va. 706.
Shrewsbury vs. Tufts, 41 W. Va. 212.

The theory of the plaintiff in filing this suit is that when he expressly granted "the right to mine and remove *all* the coal" that the language used to give expression to his intention does not mean what it says; that the Court

should construe the words used so as to give them an entirely different meaning from that which is accorded them in their every day common use. The right to "mine and remove all the coal" has been vested in the defendant by the solemn act and deed of the plaintiff, and the Court is now asked to divest the defendant of this right, by judicial construction—a construction that says the word "all" whenever hereafter used in deeds and legal documents does not mean all, but only a part. There is perhaps no word in the English language, or any other language for that matter, more commonly used by all classes of people than the word "all," and certainly no word is simpler in its form, or plainer in its meaning. It comes down to us from the old Saxon, without change of form or meaning. For more than a thousand years the word has had but one interpretation, and every person capable of speaking the English language knows what is meant when it is used. The best lexicographers give the following definitions:

I. "The whole quantity of * * a substance."
II. "The whole number of."
III. "The whole, the aggregate, the total."
IV. "Every individual, or particle."

The doctrine laid down by the Supreme Court of West Virginia in the case of Snodgrass vs. Wolf, 11 W. Va. 158 is that

> "Words when laid down in a deed or other written instrument are to be taken in their natural, plain, obvious and ordinary signification, unless a contrary intention appears from the deed itself."

If the Court follows this declaration, then there ought not to be any question as to the meaning of the word "all"

used in this deed. What other meaning can a Court consistently give to an instrument than the meaning of the *plain* words that the parties themselves have used? Would there be any question as to the meaning of this word if this had been a contract for the sale of a certain boundary of timber, with the right to cut and remove all of it? Yet, in the very process of removing the timber it would necessarily injure the surface to a considerable extent. Would any one assume that this right and privilege was not entirely covered by the general grant of a right to cut and remove it all? We must presume that the parties entering into this contract were in possession of all their faculties when the deed was executed, and that if there had been any intention to limit the right of the defendant to remove all the coal, appropriate and proper terms would have been used to show that intention; and if for any purpose only a part of what had been sold and conveyed was intended to be removed by the grantor he certainly would have set out with particularity the part so excepted. He *did* except a certain reservation around his house, and specifically mentioned it and described it in his deed. If he intended to make any other exception or reservation, he would have incorporated it in the deed. But, on the contrary, we find that he sold every pound of the coal, he was paid for every pound of the coal, he conveyed away every pound of the coal and he gave to his grantee the express and explicit right to mine and remove every pound of it. Does this deed contemplate that the grantee shall pay to the grantor any additional sum before he could exercise and enjoy the rights vested in him in this grant? It will be noted that there are several specific rights that have been vested in the defendant by this deed, viz.:

1st. The right of way through the reservation for a

road, and air-course, and a drain-way, for mining and removing the coal under co-terminous lands.

2nd. The right to enter upon and under said land.

3rd. The right to mine, excavate and remove all of said coal.

Now it necessarily follows that if the plaintiff can charge the defendant an additional sum for exercising any of these rights he can charge him for each and every one of them, for they are all in the same clause and same sentence. They are all of equal dignity and must stand upon the same footing. If there is any implied limitation or restriction upon the full and complete enjoyment of a single one of these rights, then it extends to all the others; and if the plaintiff can collect damages for removing all the coal, he can also collect it for building a road or drain way or entering upon the land, or mining, although these rights have been expressly granted away by the plaintiff and by him vested in the defendant.

In order to carry out the evident theory and intention of the plaintiff, as manifest in his declaration, it will be necessary for the Court to overturn and depart from every well recognized canon of construction that has been declared by the Supreme Courts of Virginia and West Virginia, as shown in the cases hereinabove cited.

This case surely never would have been brought in any Court in West Virginia had it not been that the Supreme Court of Pennsylvania, in the first case that was before that Court, followed the English rule, and that the States of Iowa and Illinois have followed the decisions of the Pennsylvania Courts. That doctrine, broadly stated, is that *the owner of the surface of a piece of land is entitled to have that surface supported by the owner of the coal underneath the land, when the latter attempts to mine and remove the*

coal. This can only be done, of course, in one of two ways; by building stone pillars sufficient in size and number to support the whole of the surface, no matter how large or heavy the mountain over the pillars may be — and this would involve an expenditure of money that would be worth many times more than the coal itself; or the mountain could be supported by leaving enough of the coal itself for that purpose. The logic of this doctrine is, that the owner of the surface is entitled to have that surface supported by enough coal left in the ground for that purpose, even *though it required all of the coal to remain intact.* So that the defendant, after purchasing and paying for the coal and the right to mine and remove it would be absolutely prohibited from taking a pound of coal out that he had bought and paid for. The cases in Pennsylvania and the Courts of the States following the Pennsylvania decisions have been gradually reaching this conclusion, and they can reach no other and be consistent. In fact, the latest expression upon this proposition is to be found in the case of Noonan vs. Pardee, reported in 200 Penna., page 474. This case was decided in 1901. The syllabus of the case, which is the law of the decision, is as follows:

> "What the surface owner has the right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land."

In the body of this opinion the Court cites the leading English case of Harris vs. Ryding, 5 M. & W., 60, wherein Baron Parke uses the following language:

> "I do not mean to say that all the coal does not belong to the defendant, but that they can not get it without leaving sufficient support."

After quoting this as authority for this position the Supreme Court of Pennsylvania in the case last cited say:

> "We have followed rigidly this rule, as thus tersely suggested in all of our decisions on the subject, and they have been many. Of course the defendant had a right to all of the coal under this lot, but he had no right to take any of it if thereby necessarily the surface cave in."

We cannot conceive of any position more absurd or more ridiculous than that that has been taken in the case last cited. For there the Court simply says, in substance, that the defendant bought the coal and paid for it and bought the right to mine and remove it, and paid for it, and the plaintiff sold him that right and got pay for it, and yet the defendant would not be permitted to enjoy any part of the property which had been vested in him if it in any way interfered with the surface support. This is not only not construing contracts, which is the sole and legitimate purpose of Courts, but it is absolutely nullifying the contract of the parties ignoring their intention, and assisting one to rob the other of property which he had sold him.

It is no concern of the Court if the owner of property should sell the timber from it, with the right in the vendee to cut and remove that timber, and thus injure the freehold. He has a perfect right to do so, and if he is paid for the timber and the privilege of removing it, with the damages necessarily resulting in the process of removal, he ought not be heard to complain. The same applies with equal force to one who sells coal and sells the right to mine and remove it. It is the legitimate purpose of Courts to construe deeds and contracts so as to give force and effect to the intention of the parties that made the contract, and

that intention is to be gathered from the language and expressions used in the body of the contract or deed itself. If Courts assume to nullify the plainly expressed intention of parties to deeds or other written instruments, then no contract or deed is binding and no purchaser of property would ever know whether he is to enjoy his purchase or not, until after the Court had said that it was the kind of a contract that the parties should have entered into. Such a departure from long established principles of construction would introduce into the business affairs of the community such elements of confusion, doubt and uncertainty that no man would be warranted in purchasing property, even though the expressions used in his deed were of the plainest and simplest known to the language.

It is no fault of the Court if the surface of the plaintiff's property will be injured necessarily by the mining and removing of the coal, for the plaintiff knew and must have known that that would be the necessary and natural result of his contract. He was not an imbecile or a crazy man. He knew necessarily that when all the coal was mined and taken out, according to the very terms of the agreement itself, that the mountain over which he owned the surface could not and would not remain in mid-air, and that as a necessary consequence of the exercises of the very rights with which he had vested the defendant the surface must fall when the coal is removed. And the conclusive presumption of the law is, that he not only had this in mind at the time of entering into the contract, but that he was paid an ample consideration for all the damages of which he now complains, at the time that he made his deed.

We would respectfully insist that the Court should keep in mind the fact that *Courts* are *not permitted* to *make* or *unmake contracts*, but their *sole* and *exclusive province* is to *construe* them.

THE ARGUMENT OF PLAINTIFF'S COUNSEL.

I.

Is—"The owner of the land has the right, and it has always been considered as his right, to the support of the land (surface) in its natural state, whether subjacent or adjacent."

(Senator Harmer's brief, page 3.)

This position is unquestionably correct, as long as the owner (Griffin) does nothing to impair that right; does not sell or convey it away. He has the same sacred, solemn right to the timber growing upon the surface, but it is property right which he may sell. He may part with it and vest it in his vendee by his deed; he may sell all his growing trees, with a right granted the vendee to remove all that he has bought and paid for, although in the removal serious damage may be done to the surface—the land itself—by hauling the logs across it, by cutting furrows into it. Can it be reasonably contended that the vendee in such a case could be called upon to respond in damage for the injury *necessarily* done to the surface of the land by cutting and removing the trees? Can it be maintained that such a deed, conveying *all* the trees with a right to remove *all* of them, must be so construed as to compel the vendee to leave on the ground a part of the trees for fencing, farming and building purposes, which are necessary for the complete enjoyment of the land? Both coal and timber are part and parcel of the freehold estate, as much so as the surface. There is nothing in law, morals or public policy that prohibits the owner from selling and conveying any part of his land, whether it be coal, timber or surface. There is likewise no reason whatever why he should not place such restrictions on the right of removal after pur-

chase as in his judgment would give the amplest protection against unnecessary injury occasioned by the grantee.

Who shall say that a man's right to contract about his own property in his own way, shall be restrained and limited? If Leander Griffin had originally the right to mine and remove all the coal under his lands, thereby causing the surface to sink or break, why could he not sell and convey that same right to some one else? That he did make such sale and conveyance does not admit of doubt or question.

And the answer to this argument of plaintiff's counsel is,

That the right to have his surface supported in its natural condition, has been sold and parted with by Leander Griffn, *and he has long since received full pay and compensation for any injuries necessarily resulting to his surface by reason of removing the coal.*

II.

The surface is more valuable than the coal, because it has paid more taxes.

The Court will take cognizance of the great inequalities existing in the valuation of real estate, i. e., coal, gas, oil and the surface, for the purpose of taxation. I refer the Court to the very able arguments made by Senator Harmer, of counsel for plaintiff, during the last and preceding sessions of the Legislature. Senator Harmer has pointed out the greater value of coal, when compared to the value of the surface, in such a convincing way that it no longer admits of a doubt. And the fact that local assessors did not recognize this difference in value did not in the least influence the Senator, as I am sure it will not change the Court's

knowledge of the relative value of the coal and the overlying surface.

Much of the inequalities, and I might say injustice, growing out of assessment of coal lands when compared to the valuations placed upon the surface, is due to the fact that heretofore assessments of real estate were only made every ten years; and it very frequently happened that a railroad was built into coal property shortly after the assessment of that property had been fixed for a period of ten years. And as soon as the railroad offered facilities for the transportation of coal, the value of that coal in the ground at once jumped from forty to fifty dollars an acre to seven or eight hundred dollars per acre; and although the coal was paying taxes upon a valuation fixed at a time when it was worth only thirty or forty dollars per acre, it continued the same after the coal had risen in value to seven or eight hundred dollars an acre, and of course this caused the very great inequality, for the payment of taxes necessarily placed upon the owner of the surface for the time being a greater burden of taxes than the owner of the coal was required to pay, for the surface owner paid taxes upon property valued at fifty dollars an acre, and it was not worth more, while the owner of the coal was assessed at from thirty to forty dollars an acre, when, as a matter of fact, his coal was worth seven or eight hundred dollars. But this inequality was the result of a system requiring lands to be valued for the purposes of taxation no oftener than in ten year periods, and is really no evidence whatever of the relative value of the coal and the overlying surface. It certainly cannot be given as a reason why the Courts should make contracts for men, instead of giving a proper construction to the contracts that men make for themselves.

III.

> "The grantee prepared the deed, and if he had intended to be relieved from supporting the surface he could easily have added *without liability for damages,* but he did not do it for the very reason that such was not their intention."
> (Senator Harmer's brief, page 8,)

The answer to the statement is that the deed is not the deed of the grantee, but it is the deed and language of the grantor, and the deed must be construed most strongly against the grantor. The deed itself unquestionably gives to the grantee the right to mine and remove *all* the coal, and being the act and instrument of the grantor himself, if it was not his intention that all of the coal should be removed, then it was his duty to specify in his own deed and make clear that fact and that intention upon his part. If the deed was written by the grantee, about which there is no evidence however, then he gave himself the fullest protection in the most comprehensive language that was possible for him to use, and that is, that he bought the coal and had granted unto him the right to remove all of it. This was as complete and perfect a vesting of a right as it was possible for the grantee to have, and if the grantor did intend that the deed should have another meaning than that expressed by the language used, then it was his business and his duty to so limit and qualify the language as to give expression to a different intention than that which the language used so clearly imports. To have added the words "without liability for damages," would not have given any other or different meaning to the deed than that which was provided for by the comprehensive terms used, for the granting of a right carries with it all that is necessary for the enjoyment of that right, unless a contrary intention appears from the face of the grant itself.

The consideration paid by the grantee was as much for the right to mine and remove the coal as it was to pay for the coal itself, for without such right to mine and remove, the spirit and intention of the contract and the consideration paid must all fail.

In this connection, it might be well to call the Court's attention to the methods of coal mining that have been in use since the industry began in this country.

In the first place, it is not profitable to mine, or prepare to mine, a small tract of land—by a small tract I mean one containing one hundred acres or less—and in order to justify the expenditure of so large a sum of money as is required to build and equip a modern coal plant, there must be a sufficient number of acres of coal to be mined and taken from the tipple. This number of acres is secured by the purchase of a great number of small tracts contiguous to each other, so that the aggregate will justify the development. After these various smaller tracts have been purchased and grouped together into one compact body or boundary, then the mining plant is established and the work of the removal of the coal begins. It is necessary in the first instance, in taking the deeds to the several smaller tracts from the various owners thereof to provide that the coal under co-terminous and contiguous tracts of land may be removed under the surface of the tract in question; and in the actual operation of mining, main entries and rooms are driven through to the farthest boundary line of the coal, and in doing this will necessarily have to pass under several tracts of land, the surface of which would be owned by different persons. There is left as a support to the surface pillars or ribs, constituting one-third of all the coal, until the main entries and rooms are mined out. When this has been done, the operator begins at the farthest edge of his boundary to take out the pillars and ribs that have been

left, which is the last mining done on the property and is very much more profitable than the work of taking coal out of the main entries and rooms, as the pillars and ribs can be removed for about one-half of what it costs to take the coal out of the rooms and entries.

When this deed was made, both grantor and grantee knew of the method and manner of mining and removing coal. They knew that the pillars were always removed, but only after the other coal had been taken out, and they had in mind, by the actual experience of surrounding and neighboring coal operations, the method and manner of taking out pillars, knowing that it was always done and that every purchase contemplated that it should be done, and this knowledge and intention upon the part of both grantor and grantee is absolutely conclusive from the face of the deed itself, wherein the grantor reserved three acres which should not be mined and removed, but only road-ways and air channels should be permitted to go through it. Where was the necessity, the policy or the good sense of reserving the coal under this three acres, unless it was known and intended that all the other coal was to be and should be removed?

Plaintiff's counsel insisted that because the Courts of England established the doctrine of subjacent support and that American Courts have followed the English doctrine, then the Supreme Court of West Virginia should establish the same rule. The complete answer to this position is, that the conditions existing in England when this doctrine was first promulgated are so different from those that obtain in West Virginia, that to follow the English doctrine would be to utterly and absolutely ignore all the conditions and necessities that stand for our industrial prosperity and that a Court cannot discharge its duty without keeping pace with the expanding wants and demands of a progress-

ive civilization. The American States that have followed the English doctrine have done so without giving any reason whatever for their position, other than the fact that the Courts of England have so decided.

I submit that these rulings should not be followed by this Court, for the reason that they are out of harmony with our institutions, our business interests, and are directly contrary to public policy. No more pernicious principle could ever be established, and no greater confusion could possibly result, than would necessarily follow, if this Court should depart from the principle to which it has so long adhered, and that is, that it is the business of Courts to construe contracts and not to make them; and go into the business of making contracts for men and giving effect to what ought to have been said, instead of to what was said by the express words and terms of the agreement itself.

In addition to what is said in the foregoing brief used in the Griffin case, we desire to say that the position contended for by the plaintiff in error, which, if carried to its logical conclusion, leads inevitably to an absurdity, as the following cases fully demonstrate:

The Supreme Court of Pennsylvania in the case of Noonan vs. Pardee, 200 Pa., page 474, says:

> "What the surface owner has the right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land."

This ruling was based upon the previous rulings of the Pennsylvania Court following Jones and Wagner and quoting with approval the leading English case of Harris vs. Ryding, 5 M. & W. 60, wherein Baron Park uses the following language:

> "I do not mean to say that all the coal does

not belong to the defendants, but that they cannot get it without leaving sufficient support."

In the Noonan-Pardee case the Court said—speaking of the Harris-Ryding case:

> "We have followed rigidly this rule as thus tersely suggested in all of our decisions on the subject, and they have been many. Of course the defendant had a right to all of the coal under this lot, but he had no right to take any of it if thereby necessarily the surface cave in."

The Supreme Court of Iowa has gone even a step farther, which, of course, is a logical sequence to the position of the English and Pennsylvania Courts. That Court held, in the case of Livingston vs. Moingona Coal Company, 49 Ia. 369, 31 Am. Rep. 150, that:

> "One who conveys land to another, reserving the right to remove the underlying coal, is bound to exercise ordinary care in the removal, and if necessary, leave pillars or ribs of coal to support the surface of the soil, *although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations.*"

The clause in the deed in the latter case is as follows:

> "And reserving also to said first party, his heirs, successors and assigns, all coal, coal mines, mineral products and oil beneath the surface of and belonging to said premises, with full and sole right to mine and obtain and remove the same by such means as they deem proper, *without thereby incurring in any event whatever any liability for injury caused or damage done* to the surface *of the land in working coal, coal mines, minerals, mineral products and oil and removing the same,* pro-

vided the first party shall not enter on the surface of said lands."

It will be seen in the Iowa case that the Court in substance and effect holds that it is not within the power of the parties to contract for a specific release of damages, occasioned to the surface by reason of mining and removing the coal.

That the Supreme Court of Appeals of West Virginia has given the true and correct interpretation of this deed in the Griffin case is made so certain and absolute by the reasons given in the opinions of Judges McWhorter and Cox of the Supreme Court, and concurred in by Judges Sanders and Brannon as well as the opinion of Circuit Judge Mason, that we do not deem it at all necessary to undertake to strengthen those reasons, even if we were able to do so, and it will be seen by an inspection of the very lengthy dissenting opinion by Judge Poffenbarger that his position is based upon a misconception of the language of the deed itself, wherein he assumes that there is an ambiguity in the language used; and then proceeds upon the theory that in all cases of ambiguous phraseology or meaning in written instruments that the Court has a right to clear up the doubt and try to make clear that which is inherently doubtful and cloudy; and the criticism that we have to offer on the dissenting opinion is that its assumed foundation—ambiguity—does not and can not exist in the deed that is now before the Court for interpretation.

All of which is respectfully submitted.

VINSON & THOMPSON.

KUHN v. FAIRMONT COAL COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 50. Argued December 3, 6, 1909.—Decided January 3, 1910.

When administering state laws and determining rights accruing thereunder, the jurisdiction of the Federal court is an independent one, coördinate and concurrent with, and not subordinate to, the jurisdiction of the state courts.

Rules of law relating to real estate, so established by state decisions rendered before the rights of the parties accrued, as to have become rules of property and action, are accepted by the Federal court; but where the law has not thus been settled it is the right and duty of the Federal court to exercise its own judgment, as it always does in cases depending on doctrines of commercial law and general jurisprudence.

Even in questions in which the Federal court exercises its own judgment, the Federal court should, for the sake of comity and to avoid confusion, lean to agreement with the state court if the question is balanced with doubt.

When determining the effect of conveyances or written instruments between private parties, citizens of different States, it is the right and duty of the Federal court to exercise its own independent judgment where no authoritative state decision had been rendered by the state court before the rights of the parties had accrued and become final.

The Federal court is not bound by a decision of the state court, rendered after the deed involved in the case in the Federal court was made and after the injury was sustained, holding that there is no implied reservation in a deed conveying subsurface coal and the right to mine it to leave enough coal to support the surface in its original position.

THE facts are stated in the opinion.

Mr. Homer W. Williams for Kuhn:

The Griffin case decided by the state court does not construe any statute and cannot be placed in the class of cases decided

by the state courts which control Federal courts. Nor does it establish any rule of property. This is an action of trespass on the case for tort. None of the cases cited by defendant apply.

Decisions of the state court even when decided upon a statute or upon the principle of an established rule of property, do not preclude the Federal court from passing on questions of contract out of which the cause of action accrued before the decision of the state court. *Swift* v. *Tyson*, 16 Pet. 1; *Griffin* v. *Overman Wheel Co.*, 9 C. C. A. 584; *Rowan* v. *Runnels*, 10 How. 134; *Lawrence* v. *Wickware*, Fed. Cas. No. 8,148; *S. C.*, 4 McLean, 56; *Pease* v. *Peck*, 18 How. 599; *Roberts* v. *Bolles*, 101 U. S. 119; *Burgess* v. *Seligman*, 107 U. S. 20; *Detroit* v. *Railroad Co.*, 55 Fed. Rep. 569; *King* v. *Investment Co.*, 28 Fed. Rep. 33; *Groves* v. *Slaughter*, 15 Pet. 497; *Sims* v. *Hunsley*, 6 How. 1.

The Federal courts are not bound in cases involving validity of municipal bonds by decisions of state courts made after the bonds are issued. *Enfield* v. *Jordan*, 119 U. S. 680; *Bolles* v. *Brimfield*, 120 U. S. 759; *Barnum* v. *Okolona*, 148 U. S. 393; *Gibson* v. *Lyon*, 115 U. S. 439.

The Federal courts are not bound by decisions of the state court where private rights are to be determined by application of common-law rules alone, *Chicago* v. *Robbins*, 2 Black, 418; *Hill* v. *Hite*, 29 C. C. A. 55; or contract rights depending on a state statute or provision of the Constitution if the decision of state court is made after the contract. *Central Trust Co.* v. *Street Railway Co.*, 82 Fed. Rep. 1; *Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Jones* v. *Hotel Co.*, 79 Fed. Rep. 447.

As to provisions in a deed that are merely contractual and do not affect the title the Federal courts are not bound by state court decisions. *Fire Ins. Co.* v. *Railway Co.*, 62 Fed. Rep. 904; *Bartholomew* v. *City of Austin*, 85 Fed. Rep. 359; *Jones* v. *Hotel Co.*, 86 Fed. Rep. 370; and see also *Speer* v. *Commissioners*, 88 Fed. Rep. 749; *Clapp* v. *Otoe County*, 104 Fed. Rep. 473.

Nor should the decision of the state court be followed to such an extent as to sacrifice truth, justice or law. *Faulkner* v. *Hart*, 82 N. Y. 416; *Lane* v. *Vick*, 3 How. 462; *Foxcraft* v. *Mallett*, 4 How. 353; *Loan Co.* v. *Harris*, 113 Fed. Rep. 36.

Mr. Z. Taylor Vinson and *Mr. Edward A. Brannon* for Fairmont Coal Company:

It is the duty of the Federal courts to follow the decisions of the highest court of a State in cases pending in the former where the decision of the state court construes a state statute or local law or interprets deeds or grants to real estate and determines rights pertaining thereto, wherein no Federal question is involved; nor is this duty affected by the fact that the decision is made by the state court after the contract rights involved in the case in the Federal court had accrued. *Hartford Ins. Co.* v. *Chicago &c. Ry. Co.*, 175 U. S. 91, 108; *Rowan* v. *Runnels*, 5 How. 134, 139; *Morgan* v. *Curtenius*, 20 How. 1; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 52; *Burgess* v. *Seligman*, 107 U. S. 20, 35; *Bauserman* v. *Blunt*, 147 U. S. 647, 653; *Williams* v. *Eggleston*, 170 U. S. 304, 311; *Sioux City R. R.* v. *Trust Co. of N. A.*, 173 U. S. 99.

In determining what are the laws of the several States, we are bound to look not only at their constitutions and statutes but also at the decisions of their highest courts. *Wade* v. *Travis County*, 174 U. S. 499; *Polk's Lessee* v. *Wendal*, 9 Cranch, 87; *Luther* v. *Borden*, 7 How. 1; *Nesmith* v. *Sheldon*, 7 How. 812; *Jefferson Bank* v. *Skelly*, 1 Black, 436; *Leffingwell* v. *Warren*, 2 Black, 599; *Christy* v. *Pridgeon*, 4 Wall. 196; *Post* v. *Supervisors*, 105 U. S. 667; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555; *Jackson* v. *Chew*, 6 Pet. 648; *Russell* v. *Southard*, 12 How. 139.

The construction of deeds for the transfer of land between private parties, given by the highest court of the State in which the land lies, will be adopted and followed by the Federal courts whenever the same question is presented to them. *East Central Eureka Co.* v. *Central Eureka Co.*, 204 U. S. 266,

272; citing *Brine* v. *Hartford Ins. Co.*, 96 U. S. 627, 636; *DeVaughn* v. *Hutchinson*, 165 U. S. 566; and see also *United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McGoon* v. *Scales*, 9 Wall. 23; *Olcott* v. *Bynum*, 17 Wall. 44; *Ex parte McNeil*, 13 Wall. 236; *Clark* v. *Clark*, 178 U. S. 186; *Oliver* v. *Clarke*, 106 Fed. Rep. 402; *Berry* v. *Bank*, 93 Fed. Rep. 44.

The Federal courts will lean toward an agreement of views with the state courts if the question seems balanced with doubt. *Waterworks* v. *Tampa*, 199 U. S. 244; *Mead* v. *Portland*, 200 U. S. 163; *Burgess* v. *Seligman*, 107 U. S. 20; *Wilson* v. *Standefer*, 184 U. S. 399, 412; *Bienville Water Co.* v. *Mobile*, 186 U. S. 212, 220; *Chicago Seminary* v. *Illinois*, 188 U. S. 622, 674.

The construction given by the state court to the similar deeds in the Griffin case, announced no new rules of interpretation of deeds; but, on the contrary, followed strictly a line of decisions of the state courts of West Virginia and Virginia made long prior to the date of the deed involved in this case. No rule of law previously established has been changed but the decision is in perfect accord with the English decisions. McSwinney on Mines, see 59 W. Va. 507; *Hurst* v. *Hurst*, 7 W. Va. 339; *Snodgrass* v. *Wolf*, 11 W. Va. 158; *Barber* v. *F. & M. Ins. Co.*, 16 W. Va. 658; *O'Brien* v. *Brice*, 21 W. Va. 704; *Gibney* v. *Fitzsimmons*, 45 W. Va. 334; *Long* v. *Perrine*, 41 W. Va. 158; *McDougall* v. *Musgrave*, 46 W. Va. 509; 2 Minor's Inst. pp. 996, 1066; *Carrington* v. *Goddin*, 13 Gratt. 587; *Wilson* v. *Langhorne*, 102 Virginia, 631; *King* v. *Norfolk & Western*, 99 Virginia, 625.

The court will not write new covenants into a deed. See *Gavinzel* v. *Crump*, 22 Wall. 308; *Baltzer* v. *Air Line Co.*, 115 U. S. 634; *D. & H. Canal Co.* v. *Penna. Coal Co.*, 8 Wall. 276, 290. The laws of the State in which land is situated control exclusively its descent, alienation and transfer, and the effect and construction of instruments intended to convey it. Cases *supra* and *Abraham* v. *Casey*, 179 U. S. 210; *Claiborne Co.* v.

Brooks, 111 U. S. 400; *Williams* v. *Kutland*, 13 Wall. 306; *Arndt* v. *Griggs*, 134 U. S. 316; *Suydam* v. *Williamson*, 24 How. 427; *Chicago* v. *Robbins*, 2 Black, 418; *Green* v. *Neal*, 6 Pet. 291, 296.

The rules of property covered by this principle include those governing transfer, descent, title and possession. *Warburton* v. *White*, 176 U. S. 484; 11 Cyc. 903; *Buford* v. *Kerr*, 90 Fed. Rep. 513; *Foster* v. *Oil & Gas Co.*, 90 Fed. Rep. 178.

This court has at times overruled its own decisions so as to conform to the decisions of the state court, affecting titles to real estate. *Roberts* v. *Lewis*, 153 U. S. 367; *Lowndes* v. *Huntington*, 153 U. S. 1; *Moores* v. *Bank*, 104 U. S. 625; *Forsythe* v. *Hammond*, 166 U. S. 518; *Board* v. *Coler*, 180 U. S. 506.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case is here on a question propounded under the authority of the Judiciary Act of March 3, 1891, relating to the jurisdiction of the courts of the United States. 26 Stat. 826, c. 517, § 6. The facts out of which the question arises are substantially as will be now stated.

On the twenty-first day of November, 1889, the plaintiff Kuhn, a citizen of Ohio, sold and conveyed to Camden all the coal underlying a certain tract of land in West Virginia of which he, Kuhn, was the owner in fee. The deed contained these clauses: "The parties of the first part do grant unto the said Johnson N. Camden all the coal and mining privileges necessary and convenient for the removal of the same, in, upon and under a certain tract or parcel of land situated in the county of Marion, on the waters of the West Fork River, bounded and described as follows, to wit: . . . Together with the right to enter upon and under said land and to mine, excavate and remove all of said coal, and to remove upon and under the said lands the coal from and under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described

and make all necessary structures, roads, ways, excavations, airshafts, drains, drainways and openings necessary or convenient for the mining and removal of said coal and the coal from coterminous and neighboring lands to market."

The present action of trespass on the case was brought January 18th, 1906. The declaration alleged that the coal covered by the above deed passed to the defendant, the Fairmont Coal Company, a West Virginia corporation, on the —— of January, 1906; that the plaintiff Kuhn was entitled of right to have all his surface and other strata overlying the coal supported in its natural state either by pillars or blocks of coal or by artificial support; that on the day named the defendant company mined and removed coal from under the land, leaving, however, large blocks or pillars of coal as a means of supporting the overlying surface; that the coal company, disregarding the plaintiff's rights, did knowingly, willfully and negligently, without making any compensation therefor, or for the damages arising therefrom, mine and remove all of said blocks and pillars of coal so left, by reason whereof and because of the failure to provide any proper or sufficient artificial or other support for the overlying surface, the plaintiff's surface land, or a large portion thereof, was caused to fall; and that it was cracked, broken and rent, causing large holes and fissures to appear upon the surface and destroying the water and water courses.

The contract under which the title to the coal originally passed was executed in West Virginia and the plaintiff's cause of action arose in that State.

A demurrer to the declaration was sustained by the Circuit Court, an elaborate opinion being delivered by Judge Dayton, *Kuhn* v. *Fairmont Coal Co.*, 152 Fed. Rep. 1013. The case was then taken upon writ of error to the Circuit Court of Appeals.

It appears from the statement of the case made by the Circuit Court of Appeals that in the year 1902, after Kuhn's deed to Camden, one Griffin brought, in a court of West

Virginia, an action, similar in all respects to the present one, against the Fairmont Coal Company, the successor of Camden. His rights arose from a deed almost identical with that executed by Kuhn to Camden. That case was ruled in favor of the Coal Company, and, subsequently, was taken to the Supreme Court of West Virginia, which announced its opinion therein in November, 1905. A petition for rehearing having been filed, the judgment was stayed. But the petition was overruled March 27, 1906, on which day, after Kuhn's suit was brought, the decision previously announced in the Griffin case became final under the rules of the Supreme Court of the State. *Griffin* v. *Coal Co.*, 59 W. Va. 480.

The contention by the Coal Company in the court below was that as the decision in the Griffin case covered, substantially, the same question as the one here involved, it was the duty of the Federal court to accept that decision as controlling the rights of the present parties, whatever might be its own opinion as to the law applicable to this case. The contention of Kuhn was that the Federal court was under a duty to determine the rights of the present parties upon its own independent judgment, giving to the decision in the state court only such weight as should be accorded to it according to the established principles in the law of contracts and of sound reasoning; also, that the Federal court was not bound by a decision of the state court in an action of trespass on the case for a tort not involving the title to land.

Such being the issue, the Circuit Court of Appeals, proceeding under the Judiciary Act of March 3d, 1891, c. 517, have sent up the following question to be answered:

"Is this court bound by the decision of the Supreme Court in the case of *Griffin* v. *Fairmont Coal Company*, that being an action by the plaintiff against the defendant for damages for a tort, and this being an action for damages for a tort based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being

in fact identical, that case having been decided *after* the contract upon which defendant relies was executed, *after* the injury complained of was sustained, and *after* this action was instituted?"

There is no room for doubt as to the scope of the decision in the Griffin case. The syllabus—(p. 480) which in West Virginia is the law of the case, whatever may be the reasoning employed in the opinion of the court—is as follows: "1. Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern. 2. The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate and remove all of the coal purchased and paid for by him, and if the removal of the coal necessarily causes the surface to subside or break, the grantor cannot be heard to complain thereof. 3. Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land, and to mine, excavate and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position. 4. It is the duty of the court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple and unambiguous. 5. It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain."

Nor can it be doubted that the point decided in the Griffin case had not been previously adjudged by the Supreme Court of that State. Counsel for the Coal Company expressly state that the question here involved was never before the legislature or courts of West Virginia until the deed involved in the

Griffin case came before the Supreme Court of that State for construction; that "until then there was no law and no local custom upon the subject in force in West Virginia;" and that "only after the holding of the state court in the Griffin case could it be said that the narrow question therein decided had become a rule of property in that State."

In this view of the case was not the Federal court bound to determine the dispute between the parties according to its own independent judgment as to what rights were acquired by them under the contract relating to the coal? If the Federal court was of opinion that the Coal Company was under a legal obligation while taking out the coal in question to use such precautions and to proceed in such way as not to destroy or materially injure the surface land, was it bound to adjudge the contrary simply because, in a *single* case, *to which Kuhn was not a party* and which was determined *after* the right of the present parties had accrued and become fixed under their contract, and *after* the injury complained of had occurred, the state court took a different view of the law? If, when the jurisdiction of the Federal court was invoked, Kuhn, the citizen of Ohio had, in its judgment a valid cause of action against the Coal Company for the injury of which he complained, was that court obliged to subordinate its view of the law to that expressed by the state court?

In cases too numerous to be here cited the general subject suggested by these questions has been considered by this court. It will be both unnecessary and impracticable to enter upon an extended review of those cases. They are familiar to the profession. But in the course of this opinion we will refer to a few of them.

The question as to the binding force of state decisions received very full consideration in *Burgess* v. *Seligman*, 107 U. S. 20, 33. After judgment in that case by the United States Circuit Court, the Supreme Court of the State rendered two judgments, each of which was adverse to the grounds upon which the Circuit Court had proceeded, and the con-

tention was that this court should follow those decisions of the state court and reverse the judgment of the Circuit Court. The opinion in that case states that in order to avoid misapprehension the court had given the subject special consideration, and the extended note at the close of that opinion shows that the prior cases were all closely scrutinized by the eminent Justice who wrote the opinion. A conclusion was reached that received the approval of all the members of the court. We place in the margin [1] an extract from the opinion

[1] "We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of state laws, coördinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two coördinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, *or when there has been no decision, of the state tribunals*, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the

of Mr. Justice Bradley. In *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 584, Mr. Justice Miller, speaking for the court, observed (p. 584): "It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess* v. *Seligman*, 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State." See also *Jackson* v. *Chew*, 12 Wheat. 153.

Up to the present time these principles have not been modified or disregarded by this court. On the contrary, they have been reaffirmed without substantial qualification in many subsequent cases, some of which are here cited. *East Alabama Ry. Co.* v. *Doe*, 114 U. S. 340; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555; *Gormley* v. *Clark*, 134 U. S. 338; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368; *Folsom* v. *Ninety-six*, 159 U. S. 611; *Barber* v. *Pittsburg &c. Ry.*, 166 U. S. 83; *Stanley County* v. *Coler*, 190 U. S. 437; *Julian* v. *Central Trust Co.*, 193 U. S. 93; *Comm'rs &c.* v. *Bancroft*, 203 U. S. 112; *Presidio County* v. *Noel-Young Bond Co.*, 212 U. S. 58.

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question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

We take it, then, that it is no longer to be questioned that the Federal courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws the jurisdiction of the Federal court is an independent one, not subordinate to but coördinate and concurrent with the jurisdiction of the state courts. 2. Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the State, those rules are accepted by the Federal court as authoritative declarations of the law of the State. 3. *But where the law of the State has not been thus settled*, it is not only the right but the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always lean to an agreement with the state court if the question is balanced with doubt.

The court took care, in *Burgess* v. *Seligman*, to say that the Federal court would not only fail in its duty, but would defeat the object for which the national courts were given jurisdiction of controversies between citizens of different States, if, while leaning to an agreement with the state court, it did not exercise an independent judgment in cases involving principles not settled by previous adjudications.

It would seem that according to those principles, now firmly established, the duty was upon the Federal court, in

the present case, to exercise its independent judgment as to what were the relative rights and obligations of the parties under their written contract. The question before it was as to the liability of the Coal Company for an injury arising from the failure of that corporation, while mining and taking out the coal, to furnish sufficient support to the overlying or surface land. Whether such a case involves a rule of property in any proper sense of those terms, or only a question of general law within the province of the Federal court to determine for itself, the fact exists that there had been no determination of the question by the state court before the rights of the parties accrued and became fixed under their contract, or before the injury complained of. In either case, the Federal court was bound under established doctrines to exercise its own independent judgment, with a leaning, however, as just suggested, for the sake of harmony, to an agreement with the state court, if the question of law involved was deemed to be doubtful. If, before the rights of the parties in this case were fixed by written contract, it had become a settled rule of law in West Virginia, as manifested by decisions of its highest court, that the grantee or his successors in such a deed as is here involved, was under no legal obligation to guard the surface land of the grantor against injury resulting from the mining and removal of the coal purchased, a wholly different question would have been presented.

There are adjudged cases involving the meaning of written contracts having more or less connection with land that were not regarded as involving a rule in the law of real estate, but as only presenting questions of general law touching which the Federal courts have always exercised their own judgment, and in respect to which they are not bound to accept the views of the state courts. Let us look at some of those cases. They may throw light upon the present discussion.

In *Chicago City* v. *Robbins*, 2 Black, 418, 428, which was

an action on the case for damages, the question was as to the right of the city of Chicago—which was under a duty to see that its streets were kept in safe condition for persons and property—to hold one Robbins liable in damages for so using his lot on a public street as to cause injury to a passer-by. The city was held liable to the latter and sued Robbins on that account. The state court, in a similar case, decided for the defendant, and it was contended that the Federal court should accept the views of the local court as to the legal rights of the parties. But this court, speaking by Mr. Justice Davis, said: "Where rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the state courts. But where private rights are to be determined by the application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions."

In *Lane* v. *Vick*, 3 How. 464, 472, 476, the nature of the controversy was such as to require a construction of a will which, among other property, devised certain real estate which, at the time of suit, was within the limits of Vicksburg, Mississippi. There had been a construction of the will by the Supreme Court of the State, 1 How. (Miss.) 379, and that construction, it was insisted, was binding on the Federal court. But this court said: "Every instrument of writing should be so construed as to effectuate, if practicable, the intention of the parties to it. This principle applies with peculiar force to a will. . . . The parties in that case were not the same as those now before this court; and that decision does not affect the interests of the complainants here. The question before the Mississippi court was, whether certain grounds, within the town plat, had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and of course was not binding on any one claiming under the will. With the greatest respect, it may be proper to say, that this court does not follow the state courts in their construction of a will or any other instru-

ment, as they do in the construction of statutes. Where, as in the case of *Jackson* v. *Chew*, 12 Wheat. 167, the construction of a will had been settled by the highest courts of the State, and *had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property.* The construction of a statute by the Supreme Court of a State is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a state court does not, as the construction of a statute of the State, constitute a rule of decision for the courts of the United States. In the case of *Swift* v. *Tyson*, 16 Pet. 1, the effect of section 34 of the Judiciary Act of 1789, and the construction of instruments by the state courts, are considered with greater precision than is found in some of the preceding cases on the same subject."

In *Foxcroft* v. *Mallett*, 4 How. 353, 379, the object of the action was to recover certain land in Maine. The case turned in part on the construction to be given to a mortgage of certain land to Williams College, and to local adjudications relating to those lands, which, it was contended, were conclusive on the parties. "But," this court said, "on examining the particulars of the cases cited to govern this (3 Fairfield, 398; 4 Shepley, 84, 88; 14 Maine R. 51), it will be seen that the construction of the mortgage to the college, in respect to this reservation or condition, never appears to have been agitated. *If it had been*, the decision would be entitled to high respect, though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute. 3 Sumner, 136, 277."

In *Russell* v. *Southard*, 12 How. 139, 147, the controlling question was whether in any case it was admissible to show by extraneous evidence that a deed on its face of certain real estate in Kentucky was really intended by the parties as a security for a loan and as a mortgage. The court, speaking

by Mr. Justice Curtis, after citing adjudged cases sustaining the proposition that evidence of that kind was admissible in certain States, said: "It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles"—citing *Robinson* v. *Campbell*, 3 Wheat. 212; *United States* v. *Howland*, 4 Wheat. 108; *Boyle* v. *Zacharie* 6 Pet. 635, 658; *Swift* v. *Tyson*, 16 Pet. 1; *Foxcroft* v. *Mallett*, 4 How. 353, 379.

In *Yates* v. *Milwaukee*, 10 Wall. 497, 506, the question was as to the nature and extent of the right of an owner of land in Wisconsin, bordering on a public navigable water, to make a landing, wharf or pier for his own use or for the use of the public. There was a question in the case of dedication to public use, and the city of Milwaukee sought to change or remove the wharf erected by the riparian owner in front of his lot. This court, speaking by Mr. Justice Miller, said: "This question of dedication, on which the whole of that case turned, was one of fact, to be determined by ascertaining the intention of those who laid out the lots, from what they did, and from the application of general common law principles to their acts. This does not depend upon state statute or local state law. The law which governs the case is the common law, on which this court has never acknowledged the right of the state courts to control our decisions, except, perhaps, in a class of cases where the state courts have established, by *repeated decisions*, a *rule of property* in regard to land titles peculiar to the State."

In *Louisville Trust Co.* v. *City of Cincinnati*, 76 Fed. Rep. 296, 300, 304, which was a suit by a Kentucky corporation, it became necessary to determine the force and effect of a mortgage originating in a state statute of Ohio and certain

municipal ordinances covering street easements in Cincinnati. The state court, in a suit to which the trustee in the mortgage was not a party, passed a decree declaring the scope, effect and duration of contracts or ordinances under which the mortgage, easements and franchises originated. It was insisted that the Federal court was bound to accept the views of the state court. But the Circuit Court of Appeals, held by Judges Taft, Lurton, and Hammond, ruled otherwise. Judge Lurton, speaking for all the members of that court, made an extended review of the authorities, and observed that if the state decision was regarded as conclusive upon the parties, "the constitutional right of the complainant, as a citizen of a State other than Ohio, to have its rights as a mortgagee defined and adjudged by a court of the United States is of no real value. If this court cannot for itself examine these street contracts and determine their validity, effect, and duration, and must follow the interpretation and construction placed on them by another court in a suit begun *after its rights as mortgagee had accrued, and to which it was not a party*, then the right of such a mortgagee to have a hearing before judgment and a trial before execution is a matter of form without substance. The better forum for a suitor so situated would be a court of the State. . . . The validity, effect, and duration of the street easements granted or claimed under these laws and ordinances is a question which this complainant is entitled to have decided by the courts of the United States, and the opinion of the Supreme Court of Ohio, while entitled to the highest respect as a tribunal of exalted ability, can be given no greater weight or respect than its reasoning shall demand, where the contract rights of a citizen of another State are involved, who was neither a party nor privy to the suit in which that opinion was delivered. The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statutes and city ordinances, out of which the rights of this complainant spring, is the fact that it is a citizen of

another State, and that the contract under which it has acquired an interest originated prior to the judicial opinion relied upon as foreclosing our judgment."

Upon the general question as to the duty of the Federal court to exercise its independent judgment where there had not been a decision of the state court, on the question involved, before the rights of the parties accrued, *Carroll County* v. *Smith*, 111 U. S. 556, and *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, 548, are pertinent. In the first-named case the court was confronted with a question as to the validity under the state constitution of a certain statute of the State. Mr. Justice Matthews, delivering the unanimous judgment of the court, said (p. 563): "It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal. *Burgess* v. *Seligman*, 107 U. S. 20, 33." The other case—*Great Southern Hotel Co.* v. *Jones*—presented a controversy between citizens of different States. It was sought by the plaintiffs, citizens of Pennsylvania, to enforce *a mechanics' lien upon certain real property* in Ohio. The main question was as to the validity of a statute of Ohio under which the alleged lien arose. It was contended that a particular decision of the state court holding the statute to be a violation of the state constitution was conclusive upon the Federal court. But this court, following the rules announced in *Burgess* v. *Seligman*, rejected

that view by a unanimous vote. It said (p. 548): "If, *prior to the making of the contracts between the plaintiffs and McClain*, the state court had adjudged that the statute in question was in violation of the state constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the state court, as to the constitutionality of the statute in question, having been rendered *after the rights of parties to this suit had been fixed by their contracts*, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the Federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the constitution or laws of the State."

It has been suggested—and the suggestion cannot be passed without notice—that the views we have expressed herein are not in harmony with some recent utterances of this court, and we are referred to *East Cent. E. M. Co.* v. *Central Eureka Co.*, 204 U. S. 266, 272. That case involved, among other questions, the meaning of a deed for mining property. This court in its opinion referred to a decision of the state court as to the real object of the deed, and expressed its concurrence with the views of that court. That was quite sufficient to dispose of the case. But in the opinion it was further said (p. 272): "The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the State"—citing *Brine* v. *Insurance Company*, 96 U. S. 627, 636; *DeVaughn* v. *Hutchinson*, 165 U. S. 566. Even if the broad language just quoted seems to give some support to the contention of the defendant, it is to be observed that no reference is made in the opinion to the nu-

merous cases, some of which are above cited, holding that the Federal court is not bound, in cases between citizens of different States, to follow the state decision, if it was rendered *after* the date of the transaction out of which the rights of the parties arose. Certainly there was no purpose, on the part of the court, to overrule or to modify the doctrines of those cases; and the broad language quoted from *East Cent. &c.* v. *Central Eureka Co.* must therefore be interpreted in the light of the particular cases cited to support the view which that language imports. What were those cases and what did they decide?

Brine v. *Insurance Company*, one of the cases cited, was a suit in the Federal Circuit Court to foreclose a mortgage on real estate. A foreclosure and sale were had, and the decree, following the established rules of the Federal court, allowed the defendant to pay the mortgage debt in one hundred days; and if the debt was not paid within that time, then the master was ordered to sell the land for cash in accordance with the course and practice of the Federal court. *When the mortgage was made* there was in force in Illinois and had been for many years, *a statute* which, if controlling, allowed the defendant, in a foreclosure suit, twelve months after sale to redeem the land sold. Thus, there was a conflict between the local statute and the rules and practice obtaining in the Federal court, and the question was whether the state statute or those rules governed the rights of the parties as to the time of redemption. This court held that the statute of the State, *being in force when the mortgage in question was executed*, entered into the contract between the parties and must control the determination of their rights. Speaking by Mr. Justice Miller, it said (p. 636): "The legislature of Illinois has prescribed, as an essential element of the transfer by the courts in foreclosure suits, that there shall remain to the mortgagor the right of redemption for twelve months, and to judgment creditors a similar right for fifteen months, after the sale, before the right of the purchaser to the title becomes vested. This

right, as a condition on which the title passes, is as obligatory on the Federal courts as on the state courts, because in both cases it is made a rule of property by the legislature, which had the power to prescribe such a rule. . . . At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, *which are in existence when it is made*, are so far a part of the contract that no change in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States. *Edwards* v. *Kearzey*, 96 U. S. 595. That this very right of redemption, after a sale under a decree of foreclosure, is a part of the contract of mortgage, where the law giving the right exists when the contract is made, is very clearly stated by Mr. Chief Justice Taney, in the case of *Bronson* v. *Kinzie*, 1 How. 311." *DeVaughn* v. *Hutchinson*, 165 U. S. 566, the other case cited, involved the construction of a will made in 1867 devising real estate in the District of Columbia, and the decision was based upon the law of Maryland as it had been often declared by the courts of Maryland to be while this District was part of that State—indeed, as it was from the time Maryland became an independent State.

It thus appears that in the *Brine case* the rights of the parties were determined in conformity with a valid local *statute in force when those rights accrued;* while in the *DeVaughn case*, the decision was based upon the law of Maryland, while the District was a part of that State, evidenced by a *series of decisions* made by the highest court of Maryland, *before the rights of parties accrued*. Nothing in this opinion is opposed to anything said or decided in either of those cases. The question here involved as to the scope and effect of the writing given by Kuhn to Camden does not depend upon any statute of West Virginia, nor upon any rule established by a course of decisions made before the rights of parties accrued. So that the words above quoted from *East Central &c.* v. *Central Eureka Co.* must not be interpreted as applicable to

a case like the one before us, nor as denying the authority and duty of the Federal court, when determining the effect of conveyances or written instruments between private parties, citizens of different States, to exercise its own independent judgment where no authoritative state decision had been rendered by the state court before the rights of the parties accrued and became fixed.

Without expressing any opinion as to the rights of the parties under their contract, we need only say that, for the reasons stated, the question sent to this court by the Circuit Court of Appeals is answered in the negative. It will be so certified.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, dissenting.

This is a question of the title to real estate. It does not matter in what form of action it arises; the decision must be the same in an action of tort that it would be in a writ of right.—The title to real estate in general depends upon the statutes and decisions of the State within which it lies. I think it a thing to be regretted if, while in the great mass of cases the state courts finally determine who is the owner of land, how much he owns and what he conveys by his deed, the courts of the United States, when by accident and exception the same question comes before them, do not follow what for all ordinary purposes is the law.

I admit that plenty of language can be found in the earlier cases to support the present decision. That is not surprising in view of the uncertainty and vacillation of the theory upon which *Swift* v. *Tyson*, 16 Pet. 1, and the later extensions of its doctrine have proceeded. But I suppose it will be admitted on the other side that even the independent jurisdiction of the Circuit Courts of the United States is a jurisdiction only to declare the law, at least in a case like the present, and only to declare the law of the State. It is not an authority to make it. *Swift* v. *Tyson* was justified on the ground

that that was all that the state courts did. But as has been pointed out by a recent accomplished and able writer, that fiction had to be abandoned and was abandoned when this court came to decide the municipal bond cases, beginning with *Gelpcke* v. *Dubuque*, 1 Wall. 175. Gray, Nature and Sources of the Law, §§ 535–550. In those cases the court followed Chief Justice Taney in *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416, in recognizing the fact that decisions of state courts of last resort make law for the State. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law.

The cases of the class to which I refer have not stood on the ground that this court agreed with the first decision, but on the ground that the state decision made the law for the State, and therefore should be given only a prospective operation when contracts had been entered into under the law as earlier declared. *Douglass* v. *Pike County*, 101 U. S. 677. *Green County* v. *Conness*, 109 U. S. 104. In various instances this court has changed its decision or rendered different decisions on similar facts arising in different States in order to conform to what is recognized as the local law. *Fairfield* v. *Gallatin County*, 100 U. S. 47.

Whether *Swift* v. *Tyson* can be reconciled with *Gelpcke* v. *Dubuque*, I do not care to enquire. I assume both cases to represent settled doctrines, whether reconcilable or not. But the moment you leave those principles which it is desirable to make uniform throughout the United States and which the decisions of this court tend to make uniform, obviously it is most undesirable for the courts of the United States to appear as interjecting an occasional arbitrary exception to a rule that in every other case prevails. I never yet have heard a statement of any reason justifying the power, and I find it hard to imagine one. The rule in *Gelpcke* v. *Dubuque* gives no help when the contract or grant in question has not been made on the faith of a previous declaration of

law. I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years. There were enough difficulties in the way, even in cases like *Gelpcke* v. *Dubuque*, but in them there was a suggestion or smack of constitutional right. Here there is nothing of that sort. It is said that we must exercise our independent judgment—but as to what? Surely as to the law of the States. Whence does that law issue? Certainly not from us. But it does issue and has been recognized by this court as issuing from the state courts as well as from the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end. The law of a State does not become something outside of the state court and independent of it by being called the common law. Whatever it is called it is the law as declared by the state judges and nothing else.

If, as I believe, my reasoning is correct, it justifies our stopping when we come to a kind of case that by nature and necessity is peculiarly local, and one as to which the latest intimations and indeed decisions of this court are wholly in accord with what I think to be sound law. I refer to the language of the court speaking through Mr. Justice Miller in *Brine* v. *Hartford Fire Insurance Co.*, 96 U. S. 627. To administer a different law (p. 635) is "to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right." I refer also to the unanimous decision in *East Central Eureka Mining Co.* v. *Central Eureka Mining Co.*, 204 U. S. 266, 272. It is admitted that we are bound by a settled course of decisions, irrespective of contract, because they make the law. I see no reason why we are less bound by a single one.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concur in this dissent.